162 US 290

TRANSCRIPT OF RECORD.

162-290

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~174~~. 185

DANIEL J. DAVIS AND THOMAS RANKIN, PARTNERS, DOING BUSINESS AS DAVIS & RANKIN, PLAINTIFFS IN ERROR,

vs.

H. F. GEISSLER, JOHN P. SMITH, WILLIAM HUFFMAN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED NOVEMBER 11, 1892.

(15,203.)

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SUPREME COURT OF THE UNITED STATES.

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DANIEL J. DAVIS AND THOMAS RANKIN, PARTNERS, DOING BUSINESS AS DAVIS & RANKIN, PLAINTIFFS IN ERROR,

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 4, 1895.

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1 THE UNITED STATES OF AMERICA:

To H. F. Geissler, John P. Smith, William Huffman, David Doering, John W. Rodgers, C. A. Smith, W. McDaniel, L. A. Fisher, J. W. Cast, J. J. Sears, J. W. Kerns, G. W. Doering, A. I. Hakes, Meredith Roberts, Jordan Tinsley, W. F. Sager, John A. Martin, Lawrence Doering, Willard Teft, W. Wisecarver, J. R. Humphreys, Edward Cliest, H. Sutherland, Doering and Doering, James Stalons, M. S. Ainslie, L. S. Stream, John Anderson, A. Simeton, Snyder & Snyder, C. W. Winslow, K. E. Wilcockson, B. Mahana, and E. Colvin, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the first division of the judicial district of Kansas, wherein Daniel J. Davis and Thomas Rankin, partners, doing business as Davis and Rankin, — plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John A. Riner, judge of the district court for the district of Wyoming, assigned to hold circuit court of the United States for the district of Kansas, this thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN A. RINER, *Judge.*

I hereby accept service of this citation and enter appearance of *of* above-named defendants in error.

WILCOCKSEN & WATERS,
Attorney- for Defendants in Error.

Oct. 17, 1892.

[Endorsed:] No. 6466. United States circuit court, first division of the judicial district of Kansas. Davis & Rankin *vs.* H. F. Geissler *et al.* Citation. Filed 13th day of Oct., 1892. Geo. F. Sharitt, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the first division of the judicial district of Kansas, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1891, thereof, between Daniel J. Davis and Thomas Rankin, partners as Davis and Rankin, as plaintiffs, and H. F.

Geissler, John P. Smith, William Huffman, David Doering, Jno. W. Rodgers, C. A. Smith, W. McDaniel, L. A. Fisher, J. W. Cast, J. J. Sears, J. W. Kerns, G. W. Doering, A. I. Haikes, Meredith Roberts, Jordan Tinsley, W. F. Sager, John A. Martin, Lawrence Doering, Willard Teft, W. Wisecarver, J. R. Humphreys, Edward Cliest, H. Sutheriand, Doering and Doering, James Stalons, M. S. Ainslie, L. S. Stream, John Anderson, A. Simeton, Snyder and Snyder, C. W. Winslow, K. E. Willcockson, B. Mahana, and E. Colvin, defendants, a manifest error hath happened, to the great damage of the said Daniel J. Davis and Thomas Rankin, partners, trading and doing business as Davis and Rankin, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington and filed in the office of the clerk of the Supreme Court of the United States on or before the 13 day of November, 1892, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Issued at office, in the city of Topeka, with the seal of the circuit court of the United States for the first division of the judicial district of Kansas, dated as aforesaid.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed by—
JOHN A. RINER, *Judge.*

[Endorsed:] No. 6466. United States circuit court, first division of the judicial district of Kansas. Davis & Rankin *vs.* H. F. Geissler *et al.* Writ of error to the circuit court of the United States for the first division of the judicial district of Kansas. Filed 13th day of Oct., 1892. Geo. F. Sharitt, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
First Division of the Judicial District of Kansas, } ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of Topeka, this 21st day of October, A. D. 1892.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862, }

GEO. F. SHARITT,
Clerk of said Court.

3 UNITED STATES OF AMERICA, }
District of Kansas, } ss:

In the Circuit Court of the United States in and for the District of Kansas.

DANIEL J. DAVIS and THOMAS RANKIN, Partners, Trading and Doing Business under the Firm Name and Style of Davis & Rankin, Plaintiffs,

vs.

H. F. GIESSLER, JOHN P. SMITH, WILLIAM HUFFMAN, DAVID Doering, Jno. W. Rodgers, C. A. Smith, W. McDaniel, L. A. Fisher, J. W. Cast, J. J. Sears, J. W. Kerns, G. W. Doering, A. I. Hakes, Meredith Roberts, Jordan Tinsley, W. F. Sager, John A. Martin, Lawrence Doering, Willard Teft, W. Wise Carver, J. R. Humphreys, Edward Cleist, H. Sutherland, Doering & Doering, James Stalons, M. S. Ainslie, L. S. Stream, John Anderson, A. Simeton, Snyder & Snyder, C. W. Winslow, K. E. Willcockson, B. Mahana, and E. Colvin, Defendants.

Petition.

Come now Daniel J. Davis and Thomas Rankin, partners as Davis and Rankin, plaintiffs in this the above-entitled suit, and allege that they are each and all of them residents and citizens of the State of Illinois and aver that said defendants and each and every one of them are residents and citizens of the State of Kansas, and that the amount involved in this controversy and for which this suit is brought exceeds the sum of two thousand dollars ($2,000.00), exclusive of interest and costs.

Plaintiffs further allege that on the 23rd day of November, 1887, the defendants and each of them entered into a contract in writing with Davis & Rankin, the plaintiffs herein, a copy of which contract

is hereto attached, herewith filed, marked Exhibit A, and made part of this petition.

Plaintiffs further aver that by the terms of said contract said defendants agreed to pay to plaintiffs the sum of five thousand dollars ($5,000.00) for constructing and erecting a creamery at or near the town of Oakley, in the county of Logan, in the State
4 of Kansas, upon the performance of the matters and things in said *said* contract mentioned to be done and furnished by plaintiffs.

Plaintiffs further allege that in pursuance of the contract hereinbefore mentioned and referred to they erected and put in operation for said defendants a creamery at the place and in the time and manner specified according to the plans, specifications, etc., mentioned and set out in said contract and have duly done and performed all the other terms of said contract on their part to be done and performed, whereby *they* became due from all of said defendants to said plaintiffs on the 23rd day of February, 1888, the sum of five thousand dollars ($5,000.00).

Plaintiffs further allege that they have received on account of said contract the sum of one hundred dollars ($100.00).

Yet said defendants, though often requested, have not nor have any person or persons for them ever paid said sum of money or any part thereof or any interest thereon, but to pay the same or any part thereof have hitherto and still do wholly neglect and refuse, except the $100.00 as above stated.

Wherefore plaintiffs pray and demand judgment against all of said defendants, jointly and severally, for the sum of forty-nine hundred dollars ($4,900.00), with interest thereon at the rate of six per cent. per annum from the 23rd day of February, 1888, and for costs of suit, etc.

PORTER & HUNTER,
Att'ys for Plaintiffs.

Precipe.

The clerk of the above-named court will please issue a summons to the defendants in the above-entitled cause, directed to the United States marshal for services, and make the same returnable according to law. Suit for the recovery of $4,900.00, with interest at six per cent. from the 23rd day of February, '88, and for costs
5 of suit, etc.

PORTER & HUNTER,
Att'ys for Plaintiffs.

Endorsed: No. 6466. Davis and Rankin against H. F. Geissler *et al.* Petition, exhibit, & precipe. Filed Mar. 12, 1890. Geo. F. Sharitt, clerk. Porter & Hunter, att'ys for pl'ff-.

6 EXHIBIT A.

Contract and Specification for the Chicago Creamery Association.

Davis & Rankin, proprietors.

CHICAGO, ILL., —— —, 188–.

We, Davis & Rankin, party of the first part, agree with the parties of the second part, to erect and put in operation a creamery, at or near Oakley, Kans, including an ice-room, engine-room and coal-room. The building to be 30 x 52 feet, 12 feet high, with air chambers around the entire building, built of good substantial building material, and painted with two coats of paint on the outside. All the work to be done in a substantial and workmanlike manner.

The outfit as hereinafter specified, to consist of 1 six-horse engine and 1 eight-horse boiler, upright; 3 cream vats of 200 gallons each, 1 churn of 300 gallons each, 1 power butter-worker, cold-water pump and hot-steam radiators, 25 Fairlamb patent refrigerator cans of 20 gallons each, 6 skimming pails, 12 skimmers, 1 vat strainer, 1 churn strainer, 500 Fairlamb patent milk cans, 2 sacks salt, 1 gallon butter color, 25 butter tubs, 1,000 cream checks, 6 punches, 1 cream book, 1 pair 400-pound scales with wheels, and 1 pair butter-salting scales, 1 combined wrench, 1 mop head, 1 coal shovel, 1 hatchet, 1 dozen thermometers, 1 butter-tryer, 1 graduate, 2 ladles, 1 rake, 1 broom, a well, spring or reservoir; also ground, lot 70 x 100 feet, for location of said creamery. We will also procure and keep hired at the expense of the company, a competent butter-maker, and he will superintend the manufacture of the butter for one year, if desired by the stockholders.

Said building to be constructed of pine or whitewood lumber of good quality, the outside to be finished with siding, and the inside partitions and ceilings to be ceiled with pine or whitewood ceiling, the outside walls to be lined with heavy building paper, and
7 all windows to be double glazed, and all doors and windows to be supplied with customary hardware, and the building to be supplied with 2 ventilators, as per plan, also the building to be supplied with sloping floors and drain, to extend to outside of creamery and a receiving platform. The doors and windows to be of sizes shown on plans. There is also to be a cold storage built in ice-room, 8 x 10 feet as per plan.

Each room to be furnished with its own appropriate machinery, and steam and cold-water fixtures for summer and winter use, together with a steaming and washing room as shown on plans.

Said building to have a capacity for making 1,000 lbs. of butter per day.

The plans and specifications of said creamery are hereto attached and made a part hereof.

Said Davis and Rankin agree to erect said creamery according

to the within plans and specifications for the sum of $5,000 payable in cash.

We, the subscribers hereto, parties of the second part agree to pay the above amount for said creamery when completed; the subscribers agreeing to accept the same as soon as completed to within plans and specifications. Said creamery to be completed within 90 days after the amount is subscribed; all payments under this contract to be made payable to Davis & Rankin, or their authorized agent.

As soon as the above amount of $5,000 is subscribed or in reasonable time thereafter, said subscribers may incorporate under the laws of the State as therein provided, fixing the aggregate amount of stock at $5,000 to be divided into 50 shares at 100.00 each; also it shall be further provided in the articles of said corporation and in the by-laws thereof that no assessment shall be made on the stockholders of said company for the indebtedness of the same, neither shall the private property of said stockholder be liable for such indebtedness (except that which is hereby created, and to be paid to the party of the first part).

That after said organization is completed, said company shall issue stock to the above-mentioned subscribers to the amount of their paid-up interest in said organization.

And it is hereby understood that the said Davis & Rankin will not be responsible for any pledges or promises made by their agents, that is not made a part of this contract and attached thereto, either printed or written.

For a faithful and full performance of our respective parts of the above contract, we bind ourselves, our heirs executors administrators and assigns.

Executed and dated this 23 day of November 1887.

DAVIS & RANKIN.
B. MAHANNA.

Stockholders agree to furnish land for said creamery for two hundred dollars.

Subscribers, Shares, Am't of Stock, Party of the First Part.

Name- of subscribers.	No. of shares.	Amount stock after incorporation.	Name- of subscribers.	No. of shares.	Amount stock after incorporation.
H. F. Giessler	4	400	Willard Teft	1	100
John P. Smith	1	100	W. Wise Carver	1	100
William Huffman	2	200	J. R. Humphrey	1	100
David Doering	3	300	Edward Cleist	1	100
Jno. W. Rodgers	1	100	H. Sutherland	1	100
C. A. Smith	1	100	Doering & Doering	3	300
W. McDaniel	1	100	James Stalons	1	100
L. A. Fisher	2	200	M. S. Ainslie	2	200
J. W. Cast	1	100	L. S. Stream	1	100
J. J. Sears	1	100	John Anderson	1	100
J. W. Kerns	1	100	A. Simonton	1	100
G. W. Doering A. I. Hakes	1	100	Snyder & Snyder	1	100
9					
Meredith Roberts Jordan Tinsley	1	100	C. W. Winslow	1	100
W. F. Sager	1	100	K. E. Wilcockson	1	100
John A. Martin Lawrence Doering	1	100	B. Mahanna E. Colvin	1	100
			B. Mahanna	8	800

10 In the Circuit Court of the United States for the District of Kansas.

DAVIS & RANKIN, Pl'ffs,
vs.
H. F. GEISLER *et al.* } No. 6466.

Upon the motion filed herein to attach plans & specifications, in consequence of the stipulation hereinafter made, it shall be overruled, and the defendants are to answer by July 15th, 1890, and the plaintiffs can reply at their leisure. This cause is to be continued to the November, 1890, term of this court.

The attorneys for plaintiffs have exhibited three papers, No. 1, No. 2, & No. 3, each endorsed with the names of W. A. Porter & J. G. Waters in their respective handwriting, which they assert are all the plans and specifications alluded to or referred to in the contract sued on; that they desire to retain the same, & the same may be considered as filed; that they will permit the defendants to examine them or take a copy and will produce them on call of the defendants at the trial.

Dated June 2nd, 1890.

PORTER & HUNTER,
Att'ys for Plaintiff.
J. G. WATERS,
An Att'y for Def'ts, Making the Motion.

Endorsed: No. 6466. Circuit court U. S., dist. of Kansas. Davis & Rankin *vs.* H. F. Geisler *et al.* Stipulation. Filed Jun- 2, 1890. Geo. F. Sharitt, clerk.

11 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas begun and held at the city of Leavenworth, in said district, on Monday, the 2nd day of June, 1890, proceedings were had and appear of record in words and figures following, to wit:

DAVIS & RANKIN }
vs. } 6466.
H. F. GEISSLER *et al.* }

TUESDAY, *June 3rd*, 1890.

Continued.

It is ordered by the court that the motion of defendant- to require plaintiffs to attach plans and specifications be withdrawn, and that the defendant- have 30 days to answer, plaintiff- to reply.

12 In the Circuit Court of the United States in and for the District of Kansas.

DAVIS & RANKIN, Pl'ffs, }
vs.
H. F. GEISSLER *et al.*, Def'ts. }

Defendants have leave to answer by August 15th, 1890, and plaintiffs to reply within 30 days thereafter.

WILCOCKSON & WATERS,
Att'ys for Def'ts.
PORTER & HUNTER,
Att'ys for Plaintiffs.

June 13th, 1890.

Endorsed: No. 6466. Stipulation. Filed June 12, 1890. Geo. F. Sharitt, clerk.

13 In the Circuit Court of the United States in and for the District of Kansas.

DAVIS & RANKIN, Plaintiffs, }
versus
H. T. GEISSLER *et al.*, Defendants. }

Answer.

The defendants, H. F. Geissler, John P. Smith, William Huffman, David Doering, John W. Rodgers, C. A. Smith, L. A. Fisher, J. J. Sears, J. W. Kerns, G. W. Doering, A. I. Hakes, Meredith Roberts,

Jordon Tinsley, W. Wise Carver, J. R. Humphreys, Doering & Doering, H. Sutherland, James Stalons, John Anderson, A. Simington, Snyder & Snyder, C. W. Winslow, K. E. Willcockson, and E. Colvin, for answer to the petition of the plaintiff say:

I. For a first defense they deny every allegation in said petition contained, excepting only such allegations as are hereinafter expressly admitted to be true.

II. For a second defense they deny that the paper attached to said petition and certain papers exhibited to these defendants as the plans and specifications alluded to in said paper, as will more fully appear by a written stipulation on file in this case, were the contract entered into and signed by these defendants with said plaintiffs, and these defendants aver and charge the fact to be that the plaintiffs, by their duly authorized agent and representative, one B. Mahana, a defendant in this action, falsely and fraudulently induced and procured these defendants to enter into and sign a certain contract, as will more fully appear hereinafter in the fifth defense stated in this answer, and that said paper pertaining to be said contract with said plans and specifications is not the contract so fraudulently procured from these defendants; that since the execution and delivery of said contract so fraudulently obtained the same has been altered, changed, and forged in matter and sub-
14 stance by suppressing, altering, changing, and substituting the plans and specifications then attached to, exhibited with, referred to, and accompanying said paper marked as Exhibit "A" in the petition of the plaintiff, and in their place and stead substituting other and substantially different plans and wholly leaving out and taking therefrom the entire specifications and substituting therefor the three papers alluded to in the said stipulation herein and now on file; and these defendants further aver that such alteration and change is a substantial and material one; that the same was made without their knowledge and consent and was done by the plaintiff or by some one acting for them and in their behalf and for the fraudulent purpose of injuring, cheating, and defrauding these defendants.

III. For a third defense these defendants say that the pretended contract sued on and set up and described in the petition of the plaintiff is not the contract of these defendants nor of any of them; that the same, as declared on, was not executed by these defendants nor any of them, and these defendants aver and charge the fact to be that a contract was fraudulently procured to be executed by these defendants, by one B. Mahana, a defendant herein and then the agent and representative of the plaintiffs, and that such contract as set out, shows by the petition of the plaintiff and the stipulation herein, is not the contract so procured of these defendants nor any of them; that the same has been forged, changed, and altered by the substitution of plans materially different from the plans originally with and a part of said contract so obtained, and by altogether suppressing and eliminating from such contract as signed the specifications then with and a part of such contract, and that such alterations and changes were fraudulently done for the pur-

pose of injuring, cheating, and defrauding these defendants by the plaintiffs or by some one acting for them and in their behalf and without the knowledge or consent of these defendants.

IV. For a fourth defense these defendants say that these
15 defendants did not execute, sign, or deliver the pretended contract, as set out and shown by Exhibit "A" in the petition of the plaintiffs; but these defendants and each of them were fraudulently induced to enter into a contract with the plaintiffs by one B. Mahana, a defendant herein, then the agent and representative of the plaintiffs, and that after the same had been signed, executed, and delivered by these defendants to the plaintiffs the said plaintiffs or some one acting for them and in their behalf, for the purpose of cheating and defrauding these defendants interlined, enlarged, and added to said contract, without the knowledge or consent of these defendants or any of them, the words, "Stockholders agree to furnish land for said creamery for two hundred dollars," and that by reason of such alteration the same is not the act or contract of these defendants.

V. For a fifth defense these defendants say that these defendants were fraudulently induced to enter into a contract with the plaintiffs, which contract since its execution has been falsely altered and changed since its delivery, as it stated in the second, third, and fourth defenses herein; that the defendants have at no time ever entered into any other contract with the plaintiffs; that the said contract was procured to be entered into by one B. Mahana, a defendant herein, then the agent and representative of the plaintiffs, by certain false and fraudulent representations made by the said Mahana, knowing them to be false and for the purpose of cheating and defrauding these defendants and each of them; that such representations were as follows: That the blank contract which he desired these defendants to execute was, as these defendants aver, so constructed and arranged in its presentation of a scheme for the organization of a- incorporated company and by individual subscription to the capital stock means might be procured for the erection of a creamery that it seemed by any ordinary reading of the same to be that and nothing more, and that by its pecu-
16 liarly worded and phrased terms the agreement of each signed thereto to pay for the entire creamery was easily overlooked. These defendants aver that the blank contract was so fraudulently designed and intended; that the said Mohana falsely represented it to be wholly and solely a subscription of stock for the erection of a creamery by a company to be incorporated, and that there was no liability to be incurred beyond the subscription made to such stock, and that many other of like contracts had been made, and that they had all been so construed and acted upon by the plaintiffs, and that these defendants could sign the same relying upon such construction, and that there was to be no personal liability except as a subscriber of stock; that the said Mohana fraudulently represented that the creamery was and would be of larger capacity than he knew it would be; that he fraudulently and for the purpose of deceiving these defendants pretended to be-

come a subscriber himself, when in truth he made the subscription for the plaintiffs as their agent and not for himself and concealed such fact from the defendants; that he fraudulently presented to each of these defendants detailed specifications and plans of the creamery to be built, then fraudulently intending to wholly suppress the same and to fraudulently thereafter assert that there were none except such as the paper itself disclosed; that the said Mohana procured persons to sign said subscription paper with the secret understanding that they should not be held therefor, and that such subscriptions so made were to be the inducing cause, with the countenance and aid given by such subscribers, and by their persuasion and entreaty to obtain these defendants to enter into the same, and all which acts of the said Mohana were false and known by him to be fraudulent and false and were done and performed by him as the agent and representative of the plaintiffs, by their authority, for the purpose of cheating and defrauding these defendants,
17 and that these defendants, acting upon and relying upon said false representations, signed said paper, and which, as is hereinbefore stated, has been materially altered and changed since the execution and delivery thereof.

VI. For a sixth defense these defendants say that the contract as made and entered into by and between these defendants and said plaintiffs was not performed or completed by said plaintiffs, nor was the creamery ever accepted thereunder by these defendants; but, on the contrary, these defendants aver that the plaintiffs failed to perform said contract in this: that they did not build a creamery of the dimensions, material, arrangement, and machinery as specified and shown in the certain plans and specifications which were a part of the contract; that the plaintiffs have never completed said creamery; that the same was not completed within ninety days after the amount was subscribed; that the same was not completed to the plans and specifications embraced in said contract; that the plaintiffs partly constructed said creamers only of bad material and poor workmanship, and in no way performed said contract, and that these defendants by reason of their non-compliance have been injured and suffered damage to the full extent of the price to be paid the plaintiffs for the same, and they ask judgment for the sum of five thousand dollars, with interest thereon from November 23d, 1889, by way of set-off.

VII. For a seventh defense these defendants say that this court had no jurisdiction of the subject-matter of this controversy nor of the persons of these defendants; that the defendants B. Mohana is a resident and citizen of the State of Illinois, and was at the time of the commencement of this action and ever since has been such citizen of the State of Illinois.

VIII. For an eighth defense these defendants say that this
18 court had no jurisdiction of the subject-matter of this controversy nor of the persons of these defendants; that the subscription and contract sued on, purporting to be and alleged to be the contract of the defendant B. Mohana, is not his contract; that the same was made by him as the agent of and for the plaintiffs

and by their order for them, and that the defendant has at no time had any interest whatever in the same; and these defendants further aver and charge the truth to be that for the fraudulent purpose of inducing these defendants to make subscriptions the said Mohana pretended on his own account to take stock, and for that purpose concealed the names of his principals.

IX. For a ninth defense these defendants say that the original plans and specifications attached to and forming a part of the original contract so fraudulently procured provided for a solid cross-wall under the building 18 inches thick around the building and interior cross-walls 12 inches thick; that as constructed there were no cross-walls, but a few piers in *its* place, and the outside wall was only about six inches thick; that the said original plans and specifications provided for 2 x 6 studding of pine or white wood of the first quality, and that the studding actually used is 2 x 4 of hemlock, some of them split and toenailed together, and all of said studding is culls and of the poorest quality. The said original plans and specifications provided for star A *star A* shingles of the best quality, and the shingles actually used *was* of an unknown brand and of the poorest quality. The said original plans and specifications provided that the rafters should be of the best quality of pine or white wood, and the rafters actually used were hemlock culls, some of them split and unfit for us-. The said original plans and specifications provided for two ventilators on the roof, and the creamery as actually constructed has but one, and that is
19 poorly constructed; that the said original plans and specifications provided that all dimension lumber should be of first quality, and the dimension lumber as actually used was hemlock and culls and of the poorest quality. The said original plans and specifications provided that the siding should be C siding and of the best quality, and that used was fence siding and of poor quality; that the lumber provided for in said plans and specifications was to be of the best, and that actually used was of the poorest; that the workmanship was according to said plans and specifications to be good, and it was done poorly and bad; that the machinery was to be of certain capacity by said plans and specifications and of the best quality, and that actually put in was deficient in quality and was not of such capacity, and that as to the said contract as originally made, together with the plans and specifications therewith accompanying and attached to said contract, the plaintiffs have in nowise performed the same; and these defendants aver that they have used every means to obtain such plans and specifications from the plaintiffs, but have utterly failed to obtain them, and the plaintiffs have presented to the inspection of these defendants certain plans and specifications alluded to in said contract, but which these defendants aver are substituted for the original ones and differ materially from the original ones, and that these defendants by reason of their failure to obtain an inspection of such original plans and specifications cannot now state accurately and in detail all the items and particulars thereof; and these defendants say that they have been injured and damaged by the neglect and failure of the plain-

tiffs to perform such contract and to the extent of five thousand dollars, and for which they claim a set-off with 7 per cent. interest from November 23d, 1887, if it shall be finally decided that these defendants are liable thereon, and not otherwise.

X. For a tenth defense these defendants further say that
20 at the time of signing said contract as originally presented, before the same had been fraudulently altered and before the plans and specifications had been fraudulently taken out of said contract, the defendant B. Mohana, then acting as the agent and representative of the plaintiffs and by their order and direction, agreed with these defendants that before the said contract should be delivered to said plaintiffs that there should be written in said contract the agreement of the plaintiffs that if any of the subscribers to said contract should leave the State of Kansas or become insolvent or unable from any cause to pay their respective subscriptions, that the amount subscribed by them respectively would and should be assumed and paid by the plaintiffs; that these defendants, acting on such a statement, signed the contract or paper as originally made and handed the same to the said Mohana, to be delivered to said plaintiffs on such condition being inserted therein; and these defendants aver that the said Mohana, in violation of said agreement, turned the paper over to the plaintiffs; that there has been no delivery of said paper; that a large number of the subscribers to said paper, prior to the commencement of this action, had removed from the State of Kansas, had become insolvent and unable to pay their respective subscriptions, and that the plaintiffs now attempt to repudiate such agreement and hold these defendants each liable for the payment of the entire sum.

XI. For an eleventh defense these defendants say that the plaintiffs of their own motion have released and discharged a subscriber to said pretended contract, one Willard Teft, from all liability thereon, and that by reason of such agreement and discharge these defendants and each of them are wholly discharged from liability on such pretended contract, or for no more, at the farthest, individually than the sum paid, if any, by said Teft; that by reason
21 of such discharge these defendants cannot and ought not to be held, in any event, for more than the amount received from said Teft, and which these defendants ask might be ascertained, and if, when ascertained, the same shall be found to be less than two thousand dollars, which these defendants aver it was, that then this court should no longer retain jurisdiction of the subject-matter of this controversy or of the person of these defendants.

XII. For a twelfth defense these defendants say that the said pretended contract is not the act and deed of the defendant L. A. Fisher; that he did not sign the same nor authorize any one to do so for him.

XIII. For a thirteenth defense these defendants say that all of the defendants, excepting the defendant L. A. Fisher, were fraudulently induced to sign said pretended contract upon the false and fraudulent representation of the defendant B. Mohana, then the agent of and acting for the plaintiffs, that the said Fisher had

signed the same, when the said Mohana then well knew that he had not, and that such false representations were made for the purpose of cheating and defrauding these defendants.

Wherefore these defendants pray judgment against the plaintiffs for the sum of five thousand ($5,000) dollars, with 7 per cent. interest from November 23d, 1889, with costs of suit.

J. G. WATERS,
K. E. WILLCOCKSON,
Attorneys for Defendants.

STATE OF KANSAS, } ss:
County of Logan, }

L. A. Fisher, being first sworn, on his oath says that he is a defendant in above action; that he has read the twelfth defense stated in the foregoing answer, and that the same is true.

L. A. FISHER.

22 Subscribed and sworn to before me this 21 day of August, 1890.

F. E. CANAN,
[SEAL.] *Notary Public.*

Commission expires January 6th, 1892.

STATE OF KANSAS, } ss:
County of Logan, }

William Wyscarver, J. R. Humphrey, C. A. Smith, J. W. Kerns, and H. F. Giessler, being first duly sworn, on oath severally say that they are defendants in above action; that they have read the second, third, and fourth defenses stated in the foregoing answer, and that they are true.

WILLIAM WYSCARVER.
J. R. HUMPHREY.
C. A. SMITH.
J. W. KERNS.
H. F. GIESSLER.

Subscribed and sworn to before me this 21 day of July, 1890.

F. E. CANAN,
[SEAL.] *Notary Public.*

My commission expires January 6th, 1892.

Endorsed: No. 6466. In the circuit court of the United States in and for the district of Kansas. Davis & Rankin, plaintiffs, *versus* H. T. Giessler *et al.*, defendants. Answer. Filed Jul- 29, 1892. Geo. F. Sharitt, clerk. Willkockson and J. G. Waters, att'ys for def'ts.

23 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

In the Circuit Court of the United States for the District of Kansas.

DAVIS & RANKIN, Plaintiffs, }
vs.
H. F. GEISSLER *et al.*, Defendants. }

Reply.

On this day come the plaintiffs in this the above-entitled case and for their reply to the answer of defendants heretofore filed herein deny all, each, and every allegation, averment, and statement in said answer made or contained.

These plaintiffs, further replying, deny that any contract has been altered, changed, or forged in substance or in fact, and that the allegation of the defendants in this case is simply a subterfuge and is made for the sole purpose of bringing on a controversy wherein and whereby they hope to escape a liability as set up in plaintiffs' petition herein.

These plaintiffs, further replying, allege that the conduct of the defendants and each and all of them in this case has been characterized by fraud, deceit, and such other motives as never characterize the acts of honest men; that plaintiffs have treated the defendants in this case decently and fairly, but they, on the contrary, have shown a disposition to be unfair in every particular.

These plaintiffs, further replying, allege that in a spirit of fairness they exhibited certain plans and specifications to defendants in this case, and that said defendants, being so afraid that something might be done to change the plans and specifications, carried the same away, without the consent of the plaintiffs in this case, for the sole purpose of having the same photographed. This, together with other acts, shows the animus that has actuated the defendants in this case from the time that they signed the contract down to the present time.

24 These plaintiffs, further replying, deny that B. Mahana fraudulently made any representation to the defendants in this case, but aver the fact to be that the signature of each and every individual to the contract in this case was made by that individual without fear, duress, compulsion, misrepresentation of fact, or anything else of the nature or kind, and deny that L. A. Fisher's signature is not his own signature, and deny that the defendants were induced to sign anything but their signatures, which was their own act.

These plaintiffs, further replying, allege that the defendants in this case can each and all of them read and write the English language.

PORTER AND HUNTER,
Att'ys for Pl'ffs.

Endorsed: No. 6466. Davis and Rankin against H. F. Geissler *et al.* Reply. Filed Aug. 20, 1890. Geo. F. Sharitt, clerk. Porter & Hunter, att'ys for plaintiff.

25 UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday the 24th day of November, 1890, proceedings were had and appear of record in words and figures following, to wit:

DAVIS & RANKIN, Pl'ff-,
vs.
H. F. GEISSLER *et al.*, Def't-. } 6466.

THURSDAY, *December 4th*, 1890.

It is ordered by the court that this case be, and the same is hereby, continued as per stipulation.

26 UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 1st day of June, 1891, proceedings were had and appear of record in words and figures following, to wit:

DAVIS AND RANKIN, Pl'ff-,
vs.
H. F. GEISSLER *et al.*, Defendant-. } 6466.

MONDAY, *June 1st*, 1891.

It is ordered by the court that this case be, and the same is hereby, continued as per stipulation on file.

27 In the Circuit Court of the United States in and for the District of Kansas.

DAVIS & RANKIN, Plaintiffs,
vs.
H. F. GEISSLER *et al.*, Defendants. }

Motion to Suppress the Depositions of Pl'ff.

The defendants move the court to suppress and strike from the files the pretended depositions lodged with the clerk by the plaintiffs and filed by him on Nov. 25th, 1891, in this cause for the following reasons:

1. That these papers were brought into court by the plaintiffs' attorney and here filed by him; that they were sealed up in a

sealed envelope bearing the name of the plaintiffs' business house, were not transmitted by any officer, contained no statement of any transmittal by any officer pretending to take them, and the letter in which they were sealed containing no statement that they were depositions, and the above facts just coming to the knowledge of defendants' attorneys during the selection of the jury, as appears from affidavit hereinafter following.

WILLCOCKSON & WATERS,
Att'ys for Def'ts.

STATE OF KANSAS, }
County of Shawnee, } ss:

K. E. Willcockson & J. G. Waters, each being first sworn, on his oath says, each for himself and not for each other, that before the session of court had convened this morning inquiry was made by each of those affiants for the papers in this cause and were informed that Mr. Porter, an att'y for pl'ff, had the papers; that the first knowledge this affiant had of the filing of the depositions in this cause referred to in foregoing affidavit was during the time
28 the jury were being impaneled in this cause and a few moments before the matter was called to the attention of the court.

J. G. WATERS.
K. E. WILLCOCKSON.

Subscribed & sworn to before me this 27th day of Nov., 1891.

[SEAL.] GEO. F. SHARITT,
Clerk Cir. Court.

Endorsed: No. 6466. Circuit court, district Kansas. Davis & Rankin *vs.* H. F. Geissler *et al.* Motion and affidavit. Filed Nov. 27, 1891. Geo. F. Sharitt, clerk.

29 UNITED STATES OF AMERICA, }
District of Kansas, } ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 23rd day of November, 1891, proceedings were had and appear of record in words and figures following, to wit:

DAVIS & RANKIN, Plaintiff-, }
vs. } 6466.
H. F. GEISSLER *et al.*, Def't. }

FRIDAY, *November 27th*, 1891.

The defendants' motion to suppress depositions herein came on to be heard and was argued by counsel; on consideration whereof the court overruled said motion.

DAVIS & RANKIN, Plaintiff-,
vs.
H. F. GEISSLER *et al.*, Def't-. } 6466.

Now come the plaintiffs herein, by Porter & Hunter, their attorneys, and the defendants, by K. E. Willcockson and J. G. Waters, their attorneys; and also come a jury, to wit, Alexander Dixson, S. J. Ellison, J. W. Beatty, David Neese, A. J. Marks, W. P. Martin, Hiram Davis, J. N. Barker, F. M. Johnson, J. W. Keplinger, John Bell, Sr., and John C. Collins, twelve good and lawful men of the body of the district of Kansas, who being duly impaneled and sworn to well and truly try the matters submitted to them in this action and a true verdict give, according to the law and evidence, and thereupon the trial of the case is proceeded with, and not being concluded at the time of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until tomorrow.

30 UNITED STATES OF AMERICA, } *ss.*:
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 23rd day of November, 1891, proceedings were had and appear of record in words and figures following, to wit:

DAVIS & RANKIN, Plaintiff-,
vs.
H. F. GEISSLER *et al.*, Def'ts. } 6466.

SATURDAY, *November 28th*, 1891.

Now come the parties herein same as on yesterday, and, the jurors empanelled herein being called and all being present, the following further proceedings in said case were had, to wit: After all the parties hereto had introduced their evidence and rested their case, it appearing to the court that this court had not jurisdiction of the subject-matter of this action, it is ordered that this case be, and the same is, dismissed at the costs of plaintiff-.

31 In the Circuit Court of the United States in and for the First Division of the District of Kansas.

DANIEL J. DAVIS and THOMAS RANKIN, Partners, Trading and Doing Business under the Firm Name and Style of Davis & Rankin, Plaintiffs,

vs.

H. F. GEISSLER, JOHN P. SMITH, WILLIAM HUFFMAN, DAVID Doering, Jno. W. Rodgers, C. A. Smith, W. McDaniel, L. A. Fisher, J. W. Cast, J. J. Sears, J. W. Kerns, G. W. Doering, A. I. Hakes, Meredith Roberts, Jordan Tinsley, W. F. Sager, John A. Martin, Lawrence Doering, Willard Teft, W. Wise Carver, J. R. Humphreys, Edward Cleist, H. Sutherland, Doering & Doering, James Stalons, M. S. Ainslie, L. S. Stream, John Anderson, A. Simeton, Snyder & Snyder, C. W. Winslow, K. E. Willcockson, B. Mahana, and E. Colvin, Defendants.

Bill of Exceptions.

Be it remembered that at the November term, A. D. 1891, of the above-entitled court, began and held in the city of Topeka on the fourth Monday of November, A. D. 1891, to wit, on the 28th day of November, 1891, and during the said term, this cause came on for trial by the court and a jury of the said district, duly empanelled and sworn; and the plaintiff-, to maintain the issues on their part, offered and read in evidence the instrument of writing, a copy of which is as follows, to wit:

Contract and Specification for the Chicago Creamery Association.

Davis & Rankin, proprietors.

CHICAGO, ILL., —— —, 188–.

We, Davis & Rankin, party of the first part, agree with the parties of the second part, to erect and put in operation a creamery, at or near Oakley, Kans, including an ice-room, engine-room and coal-room. The building to be 30 x 52 feet, 12 feet high, with air chambers around the entire building, built of good, sub-
32 stantial building material, and painted with two coats of paint on the outside. All the work to be done in a substantial and workmanlike manner.

The outfit as hereinafter specified, to consist of 1 six-horse engine and 1 eight-horse boiler, upright; 3 cream vats of 200 gallons each; 1 churn of 300 gallons, 1 power butter-worker, cold-water pump and hot-steam radiators, 25 Fairlamb patent refrigerator cans of 20 gallons each, 6 skimming pails, 12 skimmers, 1 vat strainer, 1 churn strainer, 500 Fairlamb patent milk cans, 2 sacks salt, 1 gallon butter color, 25 butter tubs, 1,000 cream checks, 6 punches, 1 cream book, 1 pair 400-pound scales with wheels and 1 pair butter-salting scales, 1 combined wrench, 1 mop head, 1 coal shovel, 1 hatchet, 1

dozen thermometers, 1 butter-trier, 1 graduate, 2 ladles, 1 rake, 1 broom, a well, spring or reservoir also ground, lot 70 x 100 feet, for location of said creamery. We will also procure and keep hired at the expense of the company, a competent butter-maker, and he will superintend the manufacture of the butter for one year, if desired by the stockholders.

Said building to be constructed of pine or whitewood lumber of good quality, the outside to be finished with siding, and the inside partitions and ceilings to be ceiled with pine or whitewood ceiling, the outside walls to be lined with heavy building paper, and all windows to be double glazed, and all doors and windows to be supplied with customary hardware, and the building to be supplied with 2 ventilators, as per plan, also the building to be supplied with sloping floors and drain, to extend to outside of creamery, and a receiving platform. The doors and windows to be of sizes shown on plans. There is also to be a cold storage built in ice-room 8 x 10 feet as per plan.

Each room to be furnished with its own appropriate machinery and steam and cold-water fixtures for summer and winter use, together with a steaming and washing room as shown on plans.

33 Said building to have a capacity for making 1,000 lbs. of butter per day.

The plans and specifications of said creamery are hereto attached and made a part hereof.

Said Davis & Rankin agree to erect said creamery according to the within plans and specifications for the sum of $5,000 payable in cash.

We, the subscribers hereto, parties of the second part, agree to pay the above amount for said creamery when completed; the subscribers agreeing to accept the same as soon as completed to within plans and specifications. Said creamery to be completed within 90 days after the amount is subscribed; all payments under this contract to be made payable to Davis & Rankin or their authorized agent.

As soon as the above amount of $5,000 is subscribed, or in reasonable time thereafter, said subscribers may incorporate under the laws of the State as therein provided, fixing the aggregate amount of stock at $5,000 to be divided into 50 shares at $100.00 each; also it shall be further provided in the articles of said corporation and in the by-laws thereof that no assessment shall be made on the stockholders of said company for the indebtedness of the same, neither shall the private property of said stockholders be liable for such indebtedness (except that which is hereby created, and to be paid to the party of the first part).

That after said organization is completed, said company shall issue stock to the above-mentioned subscribers to the amount of their paid-up interest in said organization.

And it is hereby understood that the said Davis & Rankin will not be responsible for any pledges or promises made by their agents, that is not made a part of this contract and attached thereto, either printed or written.

For a faithful and full performance of our respective parts
34 of the above contract, we bind ourselves, our heirs, executors, administrators and assigns.

Executed and dated this 23rd day of November, 1887.

Stockholders agree to furnish land for said creamery for four hundred dollars.

DAVIS & RANKIN.
B. MAHANNA.

Subscribers, Shares, Am't Stock, Party of the First Part.

Name of subscribers.	No. of shares.	Amount stock after incorporation.	Name of subscribers.	No. of shares.	Amount stock after incorporation.
H. F. Geissler	4	400	Willard Teft	1	100
John P. Smith	1	100	W. Wyscarver	1	100
Wm. Huffman	2	200	J. R. Humphrey	1	100
David Doering	3	300	Edward Kleist	1	100
Jno. W. Rodgers	1	100	H. Sutherland	1	100
C. A. Smith	1	100	Doering & Doering	3	300
W. McDaniel	1	100	James Stalons	1	100
L. A. Fisher	2	200	M. S. Ainslie	2	200
J. W. Cast	1	100	L. S. Stream	1	100
J. W. Sears	1	100	John Anderson	1	100
J. W. Kerns	1	100	A. Simonton	1	100
G. W. Doering	1	100	Snyder & Snyder	1	100
A. I. Hakes			C. W. Winslow	1	100
Meredith Roberts	1	100	K. E. Wilcockson	1	100
Jordan Tinsley			B. Mahanna	1	100
W. F. Sager	1	100	E. Colvin		
John A. Martin	1	100	B. Mahanna	8	800
Lawrence Doering					

And the plaintiff then read in evidence from the deposition of R. E. STURGIS as follows:

My name is R. E. Sturgis. I live at Nashville, Michigan; age, about thirty-four years; occupation, travelling salesman for Davis & Rankin. I was in the employ of Davis & Rankin in February, 1888. Pursuant to such employment I went to Oakley, Kansas, for the purpose of setting the machinery and collecting the amount due Davis & Rankin from various parties at Oakley in pursuance of a contract made and executed by Davis & Rankin, on the one part, and various gentlemen at Oakley, Kansas, on the other part, which contract was dated November 23rd, 1887. When I arrived
35 at Oakley I found the machinery in the building. I went to work and completed setting it up. About that time Mr. Edward Gordon came there. He was a representative of Davis & Rankin. We then called a meeting of the stockholders and got as

many of the stockholders there as possible, which was the greater part of them, I should say. We then put the machinery in motion and everything worked very nicely, and they expressed their opinion that everything was in nice running order. I found the building constructed in a good, workmanlike manner, and I could not find any fault with the material whatever. I did not find any of the stockholders that found any fault. I found that the company had taken possession of the buildings, in the way of filling the ice-house with ice, before I got there. They had also taken possession of all the kindling-wood and stored it away in one of the rooms, which was the refrigerator. They also held the keys to this ice-house. I tried to get the keys, and I could not find the man that had them, and they did not seem to want to tell me. I found Mr. Brown had a key and obtained it from him finally. I also employed Mr. Brown to help me set the machinery. It was not set up when I got there, and Mr. Gordon, just as I was finishing, was there and helped me about three or four hours. I checked off the machinery on the original contract. Mr. Gordon and I took the original contract and checked everything off. Everything was there as per contract. I had been a builder and a machinist. I worked at it considerable and had been in the employ of Davis and Rankin up to that time—about six or seven years. I considered the building well constructed and a very fine creamery and according to contract, as far as I could see. I had with me while there the original contract, signed by the various parties at Oakley, Kansas, and, in looking over the building and comparing it with the requirements of the contract, I found that the building met all the requirements of the contract, as did the machinery, which I checked off as I completed set-
36 ting it in its proper place prior to starting it in motion. Davis & Rankin had, so far as I could see, complied with all the requirements of the contract in regard to what kind of material placed in the building and the quality of the machinery furnished. I looked the building over and found it, I thought, as the contract called for in quality and also in workmanship. I also found the ceiling a very fine ceiling and put together well. The floors were also first quality. The windows and doors were as per contract.

Q. How were the shingles on the roof, as near as you can tell?

A. They were as good quality as the contract called for. I could not see the ice-house on account of its being full of ice. They had it locked up themselves. I got into the refrigerator and saw that they had stored all the kindling wood in there to take care of it—the cuttings from the lumber. After we had tested the machinery to our satisfaction we then saw part of the stockholders and asked for an acceptance. They didn't want to give an acceptance, but claimed that they wanted to see some man—one of the stockholders that was away. I believe they said in Chicago. They wanted me to wait until they came back. The banker, H. F. Geissler, was very anxious to settle and was very much pleased with the building and thought it would be a great thing for their country if they could only get it to going properly. I had a talk with him about the matter and he was showing me the bad stocks, and he did not

make out only about $600 or such a matter that was uncollectible and was willing to pay his at any time, but wanted me to wait until this man came home, who was one of the stockholders and directors. At the time I was there, there was no complaint made that they had been imposed upon in any way. I did not hear any claim that the contract had been forged as to any signatures. About that time I received a telegram from my house to turn the papers over to Mr. Gordon. I was ordered to Chicago, and I
37 was ordered from Chicago *in* the South. I do not know of any more that was transacted with me there. I checked off the number of rooms and everything of that kind to see that they complied with the contract. There was a manufacturing-room, an ice-house, a refrigerator, a receiving-room, office, engine and boiler room, and coal-room in the building. It complied in every part with the contract. Mr. Gordon helped me check it off. We could find nothing short.

(S'd) R. E. STURGIS.

Plaintiff also reads from the testimony of B. MAHANNA, taken on behalf of the plaintiff, as follows:

I am 49 years of age; my business is contracting for creameries and cold storages and cheese factories. I am in the employ of Davis & Rankin, and have been in their employ, I think, about five years. I am acquainted with the defendant H. F. Geissler and a number of other gentlemen in the vicinity of Oakley, Kansas. I got the contract there for building a creamery. I went to Oakley and had a meeting of the citizens of Oakley in regard to a creamery at that place. In the meeting we started a contract to build a $5,000.00 creamery there on the plan that we have built hundred- of in the United States. I started out with the help of Doering to canvass for the creamery. He helped me to get all the stock on the *the* list. We both saw every man's name put on that list, with the exception of J. W. Rodgers and Mr. Fisher. I called on Mr. Fisher at his store, as I wanted him to take $500 in stock, but he took $200 instead. I called on Mr. Rodgers at his office and wanted him to help me get this stock up, and they agreed to do it and to do all they could to help get this contract through, and he took $100 in stock to help out. Mr. Doering went through the country and in the town the same as we get up any contract, and when the amount of stock was gotten up the contract was closed and a duplicate left with them.

Q. When was the contract executed?

38 A. On the 23rd day of November, 1887. It was all perfectly satisfactory when I left there. They had also picked out the ground for the location of the creamery. L. A. Fisher signed the contract in the presence of myself and in his store. There is not a name on this contract but what was signed by the man himself, and all in the presence of Mr. Doering, except Rodgers and Fisher. In regard to this contract at Oakley, I made no promise and no statements that we don't make everywhere we get a contract

of this kind up, and these statements are always correct and true in regard to the creamery business.

Q. Did you make any false or fraudulent representations?

A. No, sir.

Q. Did you make a false representation that Fisher had signed his name to the contract when you knew he had not?

A. No, sir.

Q. Did you know that Fisher never signed his name to that contract?

A. No, sir; I had on that contract certain names before Fisher signed it, and those names are not procured by fraud or misrepresentation of facts. I have seen the original contract in this case since the commencement of this suit. It has not been altered or changed in any manner since the 23rd day of November, 1887.

Q. Did you state at the time you got this contract that there should be written in said contract an agreement with the plaintiff that if any subscribers to said contract should leave the State of Kansas or become insolvent or unable from any cause to pay their respective subscriptions that the amount subscribed by them, respectively, would and should be assumed by and be paid by plaintiffs?

A. No, sir.

Q. Did you have plans and specifications with you there
39 that you showed to defendants in the case?

A. Yes, sir.

Q. What did you do with these plans and specifications?

A. Turned them over to the builder.

Q. Did you read over to these men and did they see the contract before they signed it?

A. Yes, sir.

Q. Were all your representations made while you were there fair, honest, and truthful?

A. They were.

Q. Did you seek to take advantage of any person in securing this contract by offering them inducements to sign the contract?

A. No, sir.

Q. Did you tell the subscribers to that contract out there that each man would only be held liable for the amount of stock that he had subscribed?

A. No, sir.

Q. Did you tell them that you had many cases of this kind, and they had been so construed that each individual subscriber was only liable for his subscription.

A. No, sir; I made a subscription for $800 worth of stock, and it was not made for Davis & Rankin, but was made for myself. I am liable to that contract today for that amount.

Q. In the event that other stockholders or subscribers to this contract should be insolvent, are you liable for anything more than your individual subscription?

A. I am.

Q. How much?

A. Twice the amount of the stock.

Q. Suppose that no person has any property out of which this money could be made, who is liable for the full amount of the subscription?

A. Myself.

Q. Then, as I understand you, if all these men who have signed the original contract should become insolvent, you regard this as a joint contract?

A. Yes, sir.

Q. And if only one of them is able to pay it, and that one
40 should be yourself, and you should have a property, David & Rankin would look to you for the full payment of this contract?

A. Yes, sir.

Q. Did you see every name signed to the contract?

A. I did.

Q. Were all signed there in good faith, were they?

A. They were.

Q. Did you have anything else with you, aside from this contract; had you plans and specifications?

A. I had plans and specifications and the contract; that was all I had with me for that contract when I went to Oakley. I looked over the ground for the creamery. I told these parties that I didn't think there could be cows enough to support a creamery, but they all insisted upon building a creamery, and they would get the cows afterwards. Mr. Doering worked hard to get this creamery, and was perfectly satisfied it would be a paying investment after the first year. They were more anxious for the creamery than I was to build it, and when we called the stockholders together to close the contract and appoint a building committee to see this creamery built, then was the time to say if it was not correct, as we had our plans and specifications and contract before them at the time.

Q. Please state at what time during the progress of getting up this contract these words were placed in the contract: "Stockholders have to furnish land for said creamery for $200."

A. That was put in before the contract was closed—at the meeting called to close the contract for the creamery.

Q. In whose handwriting is it?

A. That is in my handwriting.

Q. Were these words placed there with the knowledge and consent of the various persons who signed the contract and were present at the meeting?

A. They were.

Q. Then I understand there was no enlarging or interlining or changing this contract for the purpose of cheating or de-
41 frauding any person whose name is signed to it.

A. There was not.

And the plaintiff reads in evidence from the deposition of D. F. GIBBONS as follows:

My name is D. F. Gibbons. I am 30 years old. I reside at Gardner, Ill., and am in the employ of Davis & Rankin as contractor and collector. I went to Oakley, Kansas, in the last part of May, 1888. I went on order of Davis & Rankin to go there and collect on the contract between Davis & Rankin and various parties at Oakley, Kansas, which contract was executed on the 23rd day of November, 1887, for a creamery. I went there at the time stated to see a number of the subscribers to the contract that I held. I saw the Doerings, Geissler, and probably all of those that are on this list. They thought they did not want a creamery and went on finding fault with the way in which the work had been done and the way the soliciting had been done by Mr. Mahanna, and Mr. Humphrey particularly advised these people in my presence not to accept of the building, and if they did so they would have to pay for it without doubt. He rather urged them not to accept of it, claiming the building was not to be according to contract. I had with me at that time the original contract with those parties and showed it to those parties. Nobody denied their signatures thereon, but, on the contrary, admitted their signatures, but refused to pay for various reasons; they suggested on account of the failure of Davis & Rankin to comply with the terms of the contract. The objection was not raised by them all on that ground; only Humphreys particularly. The others said there were no cows, and they did not need a factory. I heard some remarks that if they had to pay they would only have to pay so much, anyhow, and would stand a lawsuit; that the factory would be a detriment to them, anyway, since they discovered that there were no cows in the country. That seemed to be the feeling at the time I was there. I was in the office of the building and also in the ice-house and refrigerator,
42 and from the observations that I made at the time, so far as I could see, the building was constructed according to the terms of the contract and the machinery placed in the buildings. All that I saw met with the requirements of the terms mentioned in the contract. There was no fault found with the machinery placed in the building.

Plaintiff then reads from the deposition of PETER J. PETERSON as follows:

My name is Peter J. Peterson. I am about 39 years of age. I reside in Chicago, Ill., and am engaged as book-keeper for Davis & Rankin. With reference to the Oakley creamery, the amount subscribed to the building was $5,000.00, by various parties at and in the vicinity of Oakley. We have received on account of said contract $100 from Willard Teft, leaving a balance of $4,900.00, which would bear interest from the 23rd day of February, 1888. This amount of $4,900.00 is due and payable by these parties at Oakley, Kansas, to Davis & Rankin.

Plaintiff reads from the deposition of Thomas Rankin as follows:

Said THOMAS RANKIN, of lawful age, sworn to testify the truth, etc., says:

My name is Thomas Rankin. I am a member of the firm of Davis & Rankin, wholesale and retail dealers in creamery and dairy supplies, doing business in the city of Chicago, Ill. I am plaintiff in the case pending in the United States circuit court, in the first district of Kansas, against various parties at Oakley, Kansas. There is about $4,900.00 due us on the contract. The original contract is $5,000.00.

Q. When did you make that contract with the people of Oakley, Kansas?

A. November 23rd, 1887.

Q. When did you first learn defendants in this case were
43 dissatisfied with that building—before it was completed or afterwards?

A. We were not aware that there was any dissatisfaction with the building or machinery until after it was completed.

Q. The first intimation you had, as I understand, was when you sent your agent in there to collect the amount due on the creamery?

A. Yes, sir.

Q. Did they ever notify you during the process of the construction of this building that material was being placed in it other than as called for by the contract?

A. Not to my knowledge.

Q. Then it never came to your knowledge in any way, shape, or form that you were doing other than performing the requirements of the contract?

A. No, sir.

Q. Do you know whether or not the contract originally signed at Oakley, Kansas, has ever been mutilated in any respect?

A. It has not to my knowledge.

Q. State whether or not since the contract came into your hands there has been any interlineation or enlargement.

A. There has not.

Q. Then I understand you, so far as this Oakley *and* creamery is concerned, the contract price was $5,000.00, upon which you have received $100. There is a balance of $4,900, with interest thereon at the rate of 6 per cent. per annum from the 23rd day of February, 1888. Is that correct?

A. Yes, sir.

Plaintiff then reads from the deposition of DANIEL J. DAVIS as follows:

My name is Daniel J. Davis. I am a member of the firm of Davis & Rankin, plaintiffs in the case pending in the United States circuit court, district of Kansas, against H. F. Geissler and various other gentlemen of Oakley, Kansas. On or about November 23rd,

1887, Davis & Rankin entered into a contract with H. F.
44 Geissler and others, who are now defendants in this case, wherein and whereby they agreed to build a creamery at Oakley, Kansas. Davis & Rankin have performed all the requirements of that contract on their part to be performed and the defendants have wholly failed and refused to comply with the terms of the contract in this, to wit, they have neglected and refused to pay the contract price of the building. The same has been erected, equipped, machinery started in motion for the defendants. The contract price of this creamery was $5,000.00, upon which we have received $100.00 from Mr. Teft, leaving a balance of $4,900.00 now due, which will bear interest at the rate of six per cent. per annum from the 23rd of February, 1888.

Q. How long have you been acquainted with B. Mahanna and in what position is he engaged with you at this time?

A. Between five and six years.

Q. How long has he been in your employ?

A. About that length of time.

Q. Did you at any time during the process of the construction of this building have your attention called to the fact that the workmen were putting in the building material other than specified in the contract?

A. No, sir.

Q. Did defendants in this case ever notify you prior to the completion of this building that the same was not being constructed in accordance with the terms of the contract and the same would not be received when completed?

A. No, sir.

Plaintiff reads from the deposition of WILLARD TEFT as follows:

My name is Willard Teft; of lawful age, being 47 years old. My residence since on or about June, A. D. 1888, has been and is in Sawyer, Michigan; previous to that date and for 2½ years was at
45 Oakley, Kansas. During my residence at Oakley, Kansas, I owned and operated a lumber yard from which I sold and delivered lumber for the erection of from ½ to ¾ of the residents, buildings, and superstructures of the town of Oakley, Kansas. I was living at Oakley, Kansas, owning and controlling a lumber yard at that point, during the year '87 until about June 1, 1888. I am well acquainted in and around Oakley, Kansas, my business being of such a nature as would necessarily give me an extensive and intimate business acquaintance with the citizens of Oakley or vicinity, and for the same reason I was well acquainted with the business merits and financial rating of the aforesaid citizens. I was a subscriber with the other defendants mentioned herein to one certain creamery contract and specifications. This said contract and specifications aforesaid was in the possession of one B. Mahanna when I first saw it and thereafter until it was placed into the hands of Davis & Rankin, of Chicago, Ill., therein mentioned as "Davis & Rankin, party of the first part." During the time said B. Mahanna,

who purported to be an agent of the aforesaid Davis & Rankin, had possession of said contract he was engaged in canvassing the land for subscriptions. He was in Oakley, Kansas, quite a long time. He was a stranger there. He was constantly busy, day after day, in soliciting sundry persons to sign the aforesaid contract and specifications. He had only one such contract while *while* at Oakley. At least, I saw but one and I signed but one, and that one had been signed by many others before I signed it. I saw said contract before I signed it and after I signed it. I knew the parties who had signed it and knew their signatures. I never knew of any secrecy being used by Mr. Mahanna. I never saw nor heard of any undue influence being used by him. He openly canvassed, had open meeting, had street- corner discussions, and had apparently the good will and support and encouragement and assistance of our best men. I carefully read the contract that I signed. I understood that it was a joint contract. I realized my liability. I signed my name in the column marked "Name of subscriber," and in
46 another column opposite my name was a column marked "Number of shares," and in another column opposite that one and my name was another column marked "Stock after incorporation." I signed my name. I marked "I" in the share column. I marked 100 in the column marked "Am't of stock after incorporation." I supposed we would incorporate and pay in our money as we agreed to, and that the whole sum paid in would amount to $5,000.00, and when that was done our liability would cease. I thought the persons who signed before I did would pay. I thought the persons who signed after me would pay. There was a clause written in the lower left-hand corner of the printed contract when I signed it which read as follows: "Stockholders agree to furnish land for said creamery for $200." This clause had been written in when the contract was first prepared for signature. I think it was 20 days or a month being circulated. All of the citizens were interested in getting the creamery. I frequently saw the contract, being interested as a citizen and lumber dealer in getting the plant. I would frequently see Mr. Mahanna and sure to know how he was getting along. The contract was always the same one. I watched the signatures grow and increase from day to day. There was always a name or names added. I never heard any charges made by Davis & Rankin until after the creamery was built. After the contract was all signed I saw it again and it was completed. It was still the same contract. There were separate draft and plans on a large piece of card-board. These were submitted to persons desirous of seeing them by M-. Mahanna. After Mr. Mahanna was gone and Mr. Rodgers had come to build, Mr. Rodgers followed the same contract and the same plans that Mr. Mahanna had in his possession and which he submitted, and the plans were for a long time in my office, and I frequently saw them and made it my personal business and my spare time to see that they were followed by the said builder, viz., C. J. Rodgers. I was a member of the building committee. At a meeting held by the subscribers we called the association the
47 "Golden Belt Creamery." Of course, after I was chosen

chairman of said building committee, as appears on its face, I had a fourfold interest in the building and success of our creamery at Oakley—as a subscriber of the money interest, as a citizen with a contingent interest, as a lumber dealer with a direct and indirect interest in the bill of lumber that might be sold, as a member of the building committee, whose business it was to represent a large body of friends in seeing that they had a good and honest creamery built for them, and, lastly, in the fact that I would be held personally responsible by my community for good material. I have as yet paid nothing to Davis & Rankin except $100 for the issue of my share of stock. I have never been released by them and believe myself to be held by the same liability that I have ever been. I believe that if I had remained in Oakley better counsel would have prevailed and that we would have paid for our creamery and run it and this litigation and trouble would have been avoided. I have frequently seen the original contract and recognized the signatures, and to the best of my knowledge and belief they were each placed on the contract by the actual subscriber himself whose name is there signed. L. A. Fisher signed the contract in his own hand. He never disclaimed his subscription in my presence or hearing. This building was constructed according to plans and specifications. The material used complied with the terms of the agreement.

The plaintiff reads from the testimony of D. F. GIBBONS, who testified as follows:

I am 31 years of age; reside at Gardner, Ill.; was working for Davis & Rankin during the years '87, '88, and '89 and intimately acquainted with many facts pertaining to the case between this plaintiff and these defendants. The original contract upon which the Oakley creamery was built and the one which was exe-
48 cuted and signed by the said plaintiff and defendants came into my hands in the latter part of May, '88. I was instructed by plaintiffs to collect the sum of $5,000.00 from the men whose names are subscribed thereto, which said men are defendants in this suit. I came to Oakley, Kansas, the last day of May aforesaid, as I now remember, and began the work of undertaking to collect said amount. I found no organization of said defendants as promised in their contract; I found no directorship to talk to and no president and no secretary.

The building committee was Willard Teft, who was chairman; David Doering, and J. W. Kerns. Mr. Teft was not in Oakley while I was there and I could not see him. I saw David Doering, and he would not accept the property; said he wanted to be let off—wanted his name erased from the contract—wanted to sell his stock; said, "It was no country for a creamery, anyhow;" said, "It never would pay." I said, "Is it not what you bargained for; if it ain't what does it lack? I will fix it up." He made no complaint, but would not accept unless I would release him or take his stock. I could not do this, but wrote my house his complaints. The other

man, J. W. Kern, was elected to some office; said he was going away; didn't want any creamery; would not accept because the studding was hemlock. I asked him if the lumber had been bought at his lumber yard. He said, No. I kept on trying to get pay there among the subscribers, but learned there were so many hard up and poor and slow to pay that I didn't dare to settle with such; all such as that would pay if I would just take their note for the amount that each was to own in the corporation. I told them to incorporate and pay their money in as they agreed, so I could get it; if the company wanted to take their notes, all right. They said they wanted a deed. There was no one to give a deed to. They made no complaint about their creamery. Those that were responsible, whom I wanted to pay me, would not pay unless I would release them from any liability for what they said the "dead beats;"
49 said they wanted to let the dead stock out; asked me if Davis & Rankin would take the dead stock and incorporate with them. I told them "No." I told them it was time enough to talk about that after they had paid what they owed. The men who were good would demand of me to make this proposition at the house. I told them it was no use, but still I would write my house and they would direct me, but would not give any permission to compromise on any basis the Oakley subscribers agreed on. They would not allow me to release the responsible ones on payment of the individual interest that each was to have in the corporation. I said, "If you want to pay that amount, only incorporate as you agreed and then I will talk with you." They said, "Then it will be too late to get out of it; if we don't accept and pay, perhaps we can get out of it." So there I was. Those who I wanted to pay me would not, and those who would pay me in notes I didn't want. They had put up ice in the ice-house. They wanted to get that out and sell it about town. I would not let them have it, for that was not the thing to do. None of them found fault with the property except the hemlock-stud man. None of them said it was a different contract or different plans, nor different specifications, nor bad foundation, nor bad material, nor bad shingles, nor bad siding, nor bad flooring, nor bad workmanship, nor bad land, nor defective title, nor forged signatures, nor fraudulent statements, nor hindering or delaying on our part. All the trouble then was that I would not release them and let them out. I offered them the deed and the key if they would accept. They wanted it without acceptance, so that they could get their ice out to sell about town. I wanted to hold all the edge we had yet, for if the ice was theirs the creamery was theirs; if the creamery was not theirs, the ice was not
50 theirs. That's the way I looked at it. As I had done nothing at this point, I instructed Davis & Rankin of my failure and the reasons, and they ordered me away; but, hoping I might yet hear favorably from the Oakley subscribers, I carried the original contract and all of the papers pertaining to the Oakley creamery and kept them until ordered by Davis & Rankin to send them, which orders I soon received and I sent the original papers all to them, together with my report. Mr. L. A. Fisher, one of the sub-

scribers to the said contract, which said Fisher was doing business in the general store on Main street and Oakley, never denied his signature to me nor did any of the other subscribers. I said that J. W. Kern had been elected to office and refused on that account. I did not meet Mr. Kern at all. I heard that he had been elected and gone away. So none of the building committee except David Doering refused. It was J. R. Humphrey who found fault with the hemlock studding, and not J. W. Kern. J. R. Humphrey was only subscriber.

The plaintiffs here rested their case.

The defendants, to sustain the issue on their part, read from the deposition of JOHN W. KERN as follows:

John W. Kern; age, 35; occupation, merchant.

Q. You may state whether or not you are one of the defendants in this action.

A. I am.

—. Now, you may state where you resided during the month of November, A. D. 1887.

A. In Oakley, Kansas.

Q. You may state whether or not you was a subscriber in November, A. D. 1887, to a contract with the plaintiff herein for the building of a creamery in or near Oakley, Kansas, to be built and erected by the plaintiff.

A. I was.

Q. Now, you may state all you know in relation to signing said contract; also in reference to the erection of the said building.

51 A. The citizens met in the hall, and we talked over the idea of building a creamery. Mr. Mahanna was present and showed us the plans and specifications.

Q. You may state, if you know, who called this meeting that you have testified about.

A. Mr. Mahanna.

Q. You may now state whether Mr. Mahanna, as agent for the plaintiffs, exhibited to you and others there and then present certain plans and specifications for the building of a creamery at or near Oakley, Kansas.

A. He did.

Q. You may now state all you remember and know in reference to said plans and specifications.

A. I looked at the plans and specifications. The specifications showed that the material was to be of the best. My recollection of the foundation is that it should be an 18-inch wall and 18 inches under the ground; also that the studding should be 2 x 6.

Q. You may now state what the plans and specifications showed regarding a cross-wall under the building.

A. They showed a solid wall, I think, 12 inches wide.

Q. You may state, if you know, whether there was any cross-wall built under the building.

A. They used pillars instead of joice. I think they were 15 feet apart.

Q. Now you may state the thickness and height of the outside walls of the building.

A. Not over 12 inches wide. I do not remember the height.

Q. You may state the kind of studding used in building said creamery.

A. They were very poor—2 by 4—and some of them were split in two and two nailed together. I think they were hemlock.

Q. You may now state the kind and quality of shingles to be used in said building, as shown by the plans and specifications as exhibited by the plaintiff.

A. My recollection is they were to be "Star A" shingles.

52 Q. You may state where it was that Mahanna exhibited the plans and specifications to you.

A. In different places; in City hall and in K. E. Wilcockson's office.

Q. You may now state what these specifications consisted of.

A. They consisted of several sheets of paper, with a description of what the building was to be built of and how it should be built, and were to be attached to and become a part of the contract before it was delivered to Davis & Rankin. Mr. Mahanna said that after he got the required amount subscribed he would call a meeting of all the subscribers and would then make the change we spoke of in the contract and specifications, and he would attach the contract and specifications together.

Q. You may now state what changes it was that Mr. B. Mahanna, as agent for the plaintiff-, proposed to make in said contract and specifications before the delivery of said contract to Davis & Rankin, the plaintiffs.

A. There were several. One of the churns was to be changed. There were some changes to be made in the foundation and the studding. They were to establish routes and run the creamery for three weeks.

Q. You may state what B. Mahanna said to you and the other defendants in your presence in reference to the liability of the defendants under the contract and how the plaintiffs, in settlement of subscriptions, construed the contract.

A. Mr. Mahanna said that none of us should be liable for more than what we subscribed. I told him that I didn't want to sign the contract. He said, "I want you to sign it and all of the business men of the town, for prestige to help him to get the required amount of subscriptions from men in the country." I said

53 to him that lots of men in the country that would sign it would never pay their subscriptions, and that a few of us would have it all to pay. He said, "You shall only be liable for the amount you subscribe."

Q. You may state whether or not B. Mahanna, as agent for the plaintiffs, agreed with you to insert in said contract, before it was delivered to the plaintiffs, a provision that you and the other de-

fendants should only be held liable for the amount of the subscription set opposite your respective names.

A. He did.

Q. You may now state what agreement, if any, you had with B. Mahanna, agent for the plaintiff, as regards stockholders or subscribers to said contract, if said subscribers should leave the State of Kansas or become insolvent, and who did said Mahanna say and agree would pay the said subscription of said non-residents and delinquent and insolvent subscribers.

A. Davis & Rankin.

Q. You may now state whether or not said agreement was to be a part of said contract and written therein before the same was delivered by said Mahanna to Davis & Rankin; and, if so, state fully.

A. It was to become a part of the contract and written therein before it was delivered to Davis & Rankin.

Q. You may state whether or not you was one of a building committee of three directed by some of the defendants to examine the building and material to be constructed by the plaintiffs.

A. I was.

Q. You may state how many persons and who composed this building committee.

A. Three—David Doering, Willard Teft, and myself.

Q. You may now state whether you frequently examined the said building and material during the process of building.

A. Only twice during the building and once after it was done.

(Here counsel for defendants exhibits the original contract or paper to witness and asks the witness if that is the original paper signed by the witness and other defendants.)

54 A. I think it is.

Q. You may now state if said contract or paper has been changed since you signed the same, in matter or in substance, without your knowledge or consent; if so, state in what particular.

A. I think it has. It is written on the lower left-hand corner of the contract that stockholders agreed to furnish land for said creamery for $200.00. This, I think, was put there since I signed it.

Q. You may state, if you know, when and where this alteration or interlineation was made and by whom.

A. I don't know.

Q. You may state whether the original plans and specifications exhibited to you and the other defendants are attached to the original contract.

A. They are not.

Q. You may now state, if you know, where said plans and specifications are, and have you seen them since they were exhibited to you by B. Mahanna, the agent of the plaintiffs?

A. I don't know where they are. The last I saw of them they were in the possession of B. Mahanna—some time about the latter part of November, 1887.

Q. You may now state who B. Mahanna represented at the time he was taking subscriptions for the said creamery, if you know.

A. I don't know, but he said he represented Davis & Rankin.

On his cross-examination witness testified:

—. Were you one of the carpenters who assisted in the construction of the creamery building?

A. I was not.

Q. You stated in your direct examination that you had several conversations with B. Mahanna touching your liability as a subscriber. Do you know whether you had such conversations before or after you signed the contract?

A. Both before and after.

55 —. Do you know of your own knowledge whether or not the interpolation in the lower left-hand corner of the contract was there *was there* when you signed it or not?

A. I don't know, but I don't think it was.

Q. When did the "Golden Belt Creamery Association" abandon this enterprise?

A. I don't know that there was a Golden Belt Creamery Association.

Q. Why did you and your cosubscribers abandon the enterprise of operating a creamery at this place?

A. Because the building was not built according to plans and specifications and contract—that the building committee would not receive it—is all the reason that I know of.

Q. What time was it, with reference to the completion of this creamery, that you and a few more of your cosubscribers signed a petition applying to the secretary of state of Kansas asking for a charter to issue to the Golden Belt Creamery Association of Oakley, Kansas?

A. I don't know that I ever signed it. We had a meeting of a few of the stockholders and talked over the advisability of organizing, but I don't think we ever organized or got a charter, if we did, I never saw it.

Q. Is it not a fact that your reasons for abandoning the creamery project were that upon canvassing the matter fully you came to the conclusion that it would not pay?

A. No, sir.

Redirect examination by the defendants:

Q. You may now state the location and general description of ice-room as shown on original plans and specifications for said building as exhibited to you by plaintiff at the time you signed this contract as a subscriber thereto.

A. I don't remember.

56 The defendant then read from the deposition of C. A. SMITH as follows:

I am one of the defendants. My name is C. A. Smith; age, 32 years; occupation, druggist; residence, Oakley, Kansas.

Q. You may now state if you was one of the subscribers for the construction of a creamery building to be built at or near Oakley, Kansas, in December, '87, and January and February, 1888, said building to be erected by plaintiff.

A. I was.

Q. You may now state whether or not at the time and before and after you signed said contract the plaintiffs, by their agent, B. Mahanna, exhibited to you and the other defendants, in your presence, certain plans and specifications, plaintiffs claiming that said plans and specifications was a part and parcel of said contract.

A. I saw them before I signed them. Mr. Mahanna stated that they were to be a part of the contract.

Q. You may describe said plans and specifications as exhibited by said Mahanna to you.

A. They consisted of several different pieces of paper showing the outside of the creamery when complete and several interior sectional views; also showing sizes of the material to be used and the plans of the foundations, etc.

Q. You may now state what representation was made to you by B. Mahanna, as agent of the plaintiffs, in reference to your liability under said contract and the liability of the other defendants under said contract when completed.

A. He stated that each man was liable only for the sum set opposite his name.

Q. You may state whether you had any understanding with the plaintiffs' agent that there should be a provision in said contract,

57 and the same written therein, that each subscriber should be held liable for only the amount set opposite their respective names, and that said provision was to be inserted and made a part of said contract before its deliverance to Davis & Rankin by their said agent.

A. B. Mahanna said in my presence that when the subscriptions were all raised there should be a meeting called of all the stockholders, when a clause stating that no stockholder should be held liable for more than the sum set opposite their names should be inserted, and that any other change would be made at that meeting that the stockholders thought necessary.

(Defendants' counsel now exhibits to witness the original contract sued on in this action and asks witness if the provision "Stockholders agree to furnish land for said creamery for $200" was in said contract at the time he signed the same.)

A. It was not.

Q. When did you first have knowledge or know that said provision had been inserted in the contract?

A. It was after the suit was commenced.

Q. You may now state what agreement you and the other defendants had with plaintiffs in reference to plaintiffs assuming all subscriptions and stock of parties who left the State of Kansas or became insolvent and unable to pay their respective subscriptions. If you had such an agreement, was the same to become a part of the contract before its delivery by said B. Mahanna to the said plaintiffs?

A. Mr. Mahanna said in my presence that Davis & Rankin were willing to and would assume all shares and subscriptions of parties who left the State or became insolvent, and I understood that such a clause was to be inserted in the contract at a meeting which was to be called after all of the stock was subscribed for, and all
58 subscribers were to be notified when such meeting was to take place, and Mahanna so stated.

Q. And you relied upon such representations when you signed said contract?

A. I did.

Q. Was you, from the 21st to the 24th days of November, '87, a resident of and actually residing in Oakley, Kansas, and was you, between these dates or thereafter, notified by plaintiffs' agent or any person acting for plaintiffs that there would be a meeting of the subscribers to said contract for the purpose of making the addition or alteration in said contract, as testified to by you in this deposition?

A. In answer to the first, I was a resident of Oakley, Kansas, at these dates; second, I never received any notification from *from* any person representing Davis and Rankin in regard to such meeting.

Q. You may now state if, at the time you subscribed to said paper or immediately before or immediately after, B. Mahanna made any agreement, as agent for the plaintiffs, with you and the other defendants that the proviso should be made in the said paper by subscribers in regard to the operation or management of said creamery building and machinery immediately after the same was completed by the plaintiffs; if so, state fully.

A. B. Mahanna stated in my presence and in the presence of some of the other defendants that after said creamery was completed there would be a man put in charge of said creamery to establish milk routes and dispose of the cans and run the creamery for a period of three or four weeks before said creamery would be turned over to the stockholders. He stated further that a clause to that effect would be attached to the contract at a meeting of the stockholders which was to be had after all the stock had been taken and before said contract was delivered to Davis & Rankin. There was never any such meeting at all, to my knowledge.

59 Cross-examination:

Q. When did you have this conversation with B. Mahanna, or when did you hear him make the statements as to the liability of

stockholders and his promise to mutilate the contract by interlineation and otherwise?

A. During the time he was canvassing for subscribers, both before and after I signed the contract.

Q. If there were objectionable matters in the contract, why didn't you as a careful, prudent business man have them rectified before you signed it?

A. Because B. Mahanna stated, and I so understood, that when all the stock had been subscribed there was to be a meeting called of all the stockholders, each one to be notified to that effect, and at this meeting this provisional clause heretofore mentioned and any other that might be deemed necessary were to be inserted in the contract before it was to be delivered to Davis & Rankin.

Q. Do I understand you to say that B. Mahanna agreed that a meeting should be called for the purpose of limiting the subscription to individual subscribers and for the purpose of Davis & Rankin assuming the amounts subscribed by individual subscribers who should become insolvent or non-residents of the State?

A. A meeting was to be called in which a provision was to be attached to the contract to the effect that they would assume the subscriptions of parties moving from the State or becoming *or becoming* insolvent, and also to limit the liability of individual subscribers.

Q. How long was B. Mahanna here securing this contract?

A. I cannot say positively: 10 days or two weeks.

Q. As this was apparently, from what you have said, a very easy contract on the part of subscribers, did B. Mahanna do all of the work of soliciting subscriptions or was he assisted by some
60 of the best men in Oakley in getting subscribers, and, if he was, give their names.

A. I never saw anybody soliciting with the subscription paper but B. Mahanna, except the time when I signed the contract; he was then accompanied by John W. Rodgers.

Q. You may state at the time you signed the contract with Mahanna and Rodgers present who of the two, Rodgers or Mahanna, made the statements about liabilities of the stockholders and exhibited the plans and specifications.

A. B. Mahanna.

The defendant- reads from the deposition of E. T. SNYDER:

Q. State your name, residence, and occupation.

A. E. T. Snyder, Oakley, Kansas; occupation, hardware dealer.

Q. You may now state where you resided in November, '87, and January and February, '88.

A. In Oakley, Logan county, Kansas.

Q. You may now state whether during the month of November you met, together with the defendants, one B. Mahanna, representing the plaintiffs in this action; if so, state fully.

A. I met Mr. Mahanna with the defendants in this action in Stevens' hall, some time in November, '87. I do not remember the time.

Q. You may now state who B. Mahanna represented, and also, if you know, his business at Oakley.

A. He represented Davis & Rankin. His business was to organize and put in a creamery.

Q. Did B. Mahanna take subscriptions for the building of the creamery?

(Plaintiffs' counsel admits that B. Mahanna was the agent of Davis & Rankin, the plaintiffs; that he solicited subscriptions, as shown by the contract attached to plaintiffs' petition; that plaintiffs built and equipped a creamery at Oakley, Kansas.)

Q. Now, you may state if you or your firm signed a paper
61 purporting to be a subscription paper for the building of a creamery at or near Oakley, Kansas.

A. One of the firm signed as a firm.

Q. You may now state what representations was made to you or the other defendants in your presence regarding the erection of said building by the plaintiffs.

A. He represented to us that he would build a creamery here of first-class lumber, and he showed us plans of the creamery, the kind he would build here. He had different plans and views of it, showing outside and inside of creamery building—about ½ dozen papers.

Q. You may now state what representations B. Mahanna made in reference to these plans and specifications of which you have testified as being a part and parcel of the subscription paper which he presented to you and the other defendants to sign.

A. He said that the plans and specifications shown were to be attached to the contract and be a part of it.

Q. You may now state what representations B. Mahanna, as agent for the plaintiffs, made to you and the other defendants in your presence regarding the liability of the defendants who had signed or would sign the subscription paper presented by him to defendants for their signatures.

A. B. Mahanna said that we were not to pay more than what we signed—that is to say, set opposite our respective names.

Q. You may state what provision, if any, was to be inserted in this contract before it was delivered to plaintiffs and before said contract would be deemed complete.

A. I don't recollect.

Q. You may now state whether or not there was to be a meeting and inserted in said contract or attached thereto a clause providing that stockholders or subscribers should not be held liable for
62 more than was set opposite their respective names; if so, state fully.

A. I don't recollect.

(Counsel for defendant- here gives witness a paper marked Exhibit "A" and attached to plaintiffs' petition and asks witness if the name of Snyder & Snyder to said paper was signed by a member of their firm:) A. Yes.

Cross-examination:

Q. Did you examine closely so that you can tell positively what the plans and specifications were as shown by B. Mahanna?

A. All of the examination I made of these plans was as B. Mahanna held them up and showed them at the meeting held in Stevens' hall.

Q. Were these plans and specifications drawings and pictures or were they words and figures?

A. He made drawings and pictures. I did not see the figures.

Q. Is it not a fact that your brother rather than yourself signed this contract, attended the meetings, and looked after the creamery matters?

A. He did not attend any of the meetings. He signed the contract because I was busy.

Q. *The* reason of four years nearly having intervened between the signing of the contract and the present time, you do not remember clearly the facts and details concerning this transaction?

A. I do not.

The defendant- then reads from the deposition of W. WYSCARVER as follows:

Q. Are you one of the defendants in this contract?

A. I am.

Q. You may state your name and occupation and residence.

A. W. Wyscarver; 49 years; merchant; Oakley, Kansas.

(Counsel for defendant- hands witness the original contract or paper sued on in this action by plaintiffs.)

63 Q. You may now state whether this is the original contract, without changes or alterations.

A. It is not.

—. You may now state what changes, alterations, or interlineations have been made in the face of the contract since you signed the same.

A. I find here interlineations and the words that "stockholder-agree to furnish land for said creamery for $200," which was not in this contract when I signed it.

Q. You may now state whether said alteration was made with your consent or your knowledge or your directions.

A. It was not. No person had any authority to make any change.

Q. Now you may state what representations, if any, were made to you and the other defendants in your presence by B. Mahanna, as agent for plaintiffs, in procuring your signature to the said paper and the signatures of the other defendants, as regards your liability and the liability of the other subscribers to said subscription paper.

A. Mr. Mahanna stated to me that no individual subscriber would be held liable for the subscription of others. He came to me a second time and alluded to the contract. I asked him

whether I would be held liable for the subscriptions of any others. I asked him who would assume the delinquent subscriptions. He told me Davis & Rankin. The reason I asked this question was because I thought there were men on the subscription list who I thought were irresponsible.

Q. You may now state whether or not, at the time you *made* the conversation with B. Mahanna, he exhibited to you certain plans and specifications, which he represented as belonging to and forming a part of the subscription paper; if so, state fully.

A. He did. It has been about four years since I saw the papers, and I do not remember what they were.

64 Cross-examination:

Q. When did you see this contract?

A. I do not remember the exact date. I do not remember if it was before or after November 23rd, '87, or not.

Q. At the time you signed this contract how many names were signed and which ones were in your judgment responsible?

A. I don't know how many had signed; I think about a dozen, and of that number the following were irresponsible: A. J. Hakes, John A. Martin, William McDaniel, and John W. Rodgers.

Q. Was this man, B. Mahanna, ordinarily a sensible business man or was he crazy?

A. I don't know.

The plaintiff- reads from the deposition of A. SIMONTON:

Q. Are you one of the defendants in this action?

A. I am.

Q. State your name, age, residence, and occupation.

A. A. Simonton; age, 51 years; on section 32, 9, 31, in Thomas county, Kansas, about 9 miles northeast from Oakley, Kansas; occupation, farmer.

(Counsel for defendant- exhibits and gives the witness the original contract or subscription paper sued on in this action by plaintiffs and asks witness if this paper has been altered or changed in matter or substance since witness signed the same, and, if so, state fully such alteration or changes.)

A. It has been changed since I signed the contract by adding these words to it: That stockholders agree to furnish land for said creamery for $200.00.

Q. You may state whether or not you authorized or directed this alteration to be made, and when did you first have knowledge that the same had been made?

A. I never authorized any one to make any alteration. I
65 had no knowledge of it until now.

Q. You may state what representation, if any, was made to you by said B. Mahanna when you signed said subscription paper for the erection of the creamery, in reference to your liability under and by virtue of said contract.

A. B. Mahanna said that I would not be liable but for my $100 which I subscribed.

Q. Did you sign said paper relying on said promise and agreement of said plaintiffs?

A. I did.

Cross-examination:

Q. Do you remember on what page you signed the contract?

A. I do not.

Q. Did you read the contract before you signed it?

A. I did.

Q. Is it the same contract which is attached to the petition filed in this case?

A. It is the same contract, with the exception of the interlineation.

Q. Do you know whether the words "Stockholders agreed to furnish land for said creamery for $200.00" was written on the contract before or after November 23, 1887?

A. I don't know; but I do know it was not there when I signed it.

Defendant- reads from the deposition of J. W. CLARK as follows:

Q. You may state your name, age, residence, and occupation and where you resided during the year '87.

A. My name is J. W. Clark; am 43 years old; in Thomas county, Kansas, about 8 miles northeast of Oakley, Kansas; occupation, farmer. I resided during the year 1887 in Thomas county, Kansas, at the same place where I do now.

66 Q. You may state whether you are interested directly or indirectly in this action.

A. I am not.

Q. You may now state whether or not you were acquainted or met with B. Mahanna, the agent of the plaintiffs, during the fall of winter of 1887.

A. I met him, but am not personally acquainted with him. I think I met him the last of October or the first of November, 1887. I met him at our school-house.

Q. You may now state what conversation was then and there had with said Mahanna regarding the erection of the creamery at or near Oakley, Kansas, and your taking stock in or subscribing to the contract for building the same.

A. He came out there to the school-house, where I was at work, and he said he was soliciting subscribers, and he wanted me to subscribe and I would not do it, and he kept arguing the question with us—myself, J. Z. Bates, and *and* A. Simonton, his son-in-law, and others present. He said if Bates and I would take one-half share he would take the other half share himself. He said they were going to build a creamery at Oakley, complete it, and furnish us cans at $2 apiece. We could pay for the cans in cream, he said,

after they got it running and established their routes. I asked him when we had to pay this subscription. He said, after they had the thing running and received by the building committee. At the same time, with these present, he said I would be held for $25, or just what I subscribed for.

Cross-examination:

Q. Who was to furnish these milk-cans?

A. The creamery company.

Q. Was it the Golden Belt Creamery Company or Davis & Rankin, of Chicago?

A. It was the company that Mr. Mahanna represented.

Q. Was Mr. Mahanna alone on the occasion you mention
67 or were there some of the business men of Oakley with him, who tried to persuade you to subscribe or sign this contract? If so, state who they were and what they said.

A. There was somebody else with him. Mr. William Doering, of Oakley, Kansas, was with him. Mr. Doering did not try to get me to sign the contract.

Q. Were these conversations with Mahanna made before or after November 23rd, 1887?

A. I cannot positively say if it was before or after, but I think it was before.

Defendant reads from the deposition of C. W. DOERING as follows:

Q. Are you one of the defendants in this action?

A. Yes.

Q. State what length of time you have resided in Oakley, Kansas, and were you here during the fall and winter of '87?

A. I came to Oakley in October, '87, and resided here ever since.

Q. You may now state whether during the month of November, 1887, you became acquainted with one B. Mahanna, the plaintiffs' agent in this action?

A. Yes.

Q. You may now state, if you know, what business the said B. Mahanna was engaged in—what firm he represented.

A. He said he represented Davis & Rankin, of Chicago, to take contracts for the construction of creamery-s.

Q. You may now state whether you had any conversation with B. Mohanna in the month of February, 1887, as agent for the plaintiffs, regarding the construction and putting in operation — a creamery at or near Oakley, Kansas, said creamery to be erected by the plaintiffs.

A. Yes.

Q. You may now state whether or not during the conversation you had with the plaintiffs' agent, B. Mahanna, he had with
68 him and exhibited to you certain planks and certain plans and specifications for creamery buildings.

A. He had a blank contract and plans and specifications.

Q. For how long a time was B. Mahanna in Oakley, Kansas, and vicinity, and what did he state to you was his business here at that time, and what was he engaged in?

A. He was here from ten to 14 days. He said he was trying to get subscriptions for a creamery here at Oakley, and at that time was soliciting subscriptions.

(Counsel for defendants exhibits to witness subscription list or paper sued on by plaintiffs in this action and asks witness first the following question:)

Q. Is this paper the original paper signed by you as a subscription paper or contract, and by the other defendants in your presence, without any alteration or interlineation in substance or in form?

A. It is not.

Q. Has this contract been interlined and changed since you and the other defendants subscribed to same? If so, state in what manner.

A. Yes; by inserting this provision in the end: "Stockholders agree to furnish land for said creamery for $200.00."

Q. You may now state if this provision was inserted by your direction or not.

A. It was not.

Q. You may now state if you was with Mr. Mahanna when this subscription was being raised and he was soliciting subscribers, and how many subscribers, and give the number of persons who signed such subscription paper while you were with him; and you may state further what representations, if any, were made by you and the said B. Mahanna, as agents of the plaintiffs, to obtain subscription to said contract for the building of a creamery.

69 A. I was with him part of the time. We got eight subscribers, as follows: A. J. Hakes, Meredith Roberts, Jordan Tinsel, William F. Sager, John A. Martin, Lawrence Doering, A. Simonton, and E. Colvin. We said that the creamery would be 30 by 60 feet; that it was to be built of first-class lumber; was to have two ventilators on top of the building, painted with two coats of paint on the inside, and that they, Davis & Rankin, would distribute the cans, establish the route at their own expense, and that they would not have to accept the creamery until the first butter had been made. We further told the subscribers that they would only be responsible for the amount of money set opposite their names. If any one became insolvent or the amount could not be collected of them, then they, Davis & Rankin, would assume their subscriptions. We exhibited the contract to be signed, and the plans and specifications that were attached to it was a part of the contract.

Q. You may state whether Mahanna represented and stated to you and the other subscribers you have mentioned that these plans and specifications were a part and parcel of said subscription paper or contract signed by you and the other subscribers. State fully.

A. Yes. He said that the only reason the plans and specifications were not attached to the contract was because they had to be rolled up carefully to keep them from tearing and getting disfigured,

but that he would attach them after enough subscriptions had been obtained.

Q. You may now state whether or not on or about the 22nd or 23rd day of November, 1887, you had a conversation with B. Mahanna in reference to subscribing to said list or contract.

A. Yes.

Q. You may now state that conversation.

A. He said that he did subscribe in his own name, but that the shares belonged to Davis & Rankin.

Q. Did B. Mahanna state to you that the defendant L. A.
70 Fisher had signed said contract or subscription list, and did the signature of said L. A. Fisher appear on said subscription list when you signed it?

A. He stated to me that Fisher signed the contract, and his name appeared on it when I signed it.

Q. You may now state whether you are acquainted with one B. F. Gibbons, as representative and attorney-in-fact of Davis & Rankin.

A. Yes.

Q. You may now state the time or about the time he was in Oakley, Kansas, as a representative of plaintiff.

A. He was there in the spring of '88.

Q. You may now state whether during the last days of May, 1888, you had a conversation with said Gibbons in reference to plans and specifications shown by plaintiffs' former agent, B. Mahanna, to subscribers for the creamery at Oakley, Kansas.

A. Yes; I had such a conversation. He proposed that if David Doering, a member of the building committee, would give us a written acceptance of the creamery he would accept our subscriptions and give us a receipt in full and release us from further liabilities, among them being David Doering, H. F. Geissler, D. W. Doering, Doering & Doering, and a few others. He further said that that would give him a chance to get at the kickers.

Q. Did B. Mahanna give you a receipt for $50 and for one-half share of stock in the Oakley Creamery Association?

A. Yes; he did.

Cross-examination:

Q. Did the contract specify that Davis & Rankin were to assume delinquent and non-resident subscriptions? Please answer yes or no.

A. No; but B. Mahanna told all of the subscribers that I saw so, that they were responsible for more than the amount signed for by them, and he told me personally that Davis & Rankin would
71 assume all delinquent subscriptions.

Q. Did the contract specify that Davis & Rankin were to furnish milk-cans to subscribers at $2 for a can and take their pay in cream?

A. No; he didn't.

Defendant reads from the deposition of G. W. DOERING as follows:

In answer to question No. 10, propounded yesterday, witness answers as follows:

A. About the middle of January, 1888, Mr. Rodgers, an expert builder of creameries, then building the creamery here for Davis & Rankin, came to me and said that if we people intended to make butter the following summer we would need ice. He also said that he had seen some of the other subscribers, and the best thing we could do would be to get together and make arrangements.

Q. Now, Mr. Doering, you have complained that the subscribers have been injured on account of certain words written in the contract, as follows: "Stockholders agree to furnish land for said creamery for $200.00." Please state in what manner this additional writing was injured, cheated, or defrauded the subscribers to the contract and in what manner they have been imposed on by Davis & Rankin by reason thereof.

A. I don't know that they have been injured very much.

DAVID DOERING testifies by his deposition as follows:

Q. Are you one of the defendants in this action?

A. Yes.

Q. State your name, age, residence, and occupation.

A. David Doering; age, 51; residence, Oakley, Kansas; occupation, merchant.

Counsel for defendants now exhibits to witness the original contract or subscription paper sued on in this action and asks the witness as follows:

72 Q. Is this contract the same contract in substance and in form that you and the other defendants in this action signed for the erection of a creamery at or near Oakley, Kansas, in the winter of '87 and '88?

A. It is not.

Q. You may now state what alteration or interlineation, if any, has been made in said subscription paper or contract since you and the other defendants signed the same.

A. Since I signed this contract the following words have been added: "Stockholders agree to furnish land for said creamery for $200.00."

Q. You may now state if you were at a meeting called by B. Mahanna at City hall in Oakley in November, 1887.

A. Yes; I was.

Q. You may now state whether or not the said B. Mahanna exhibited to you and the other defendants then and there present certain plans and specifications for the building of a creamery at Oakley, Kansas; and, if so, you may now describe said plans and specifications.

A. He had a plan of the foundation and of the creamery building,

and he said they were to be a part of the contract and so represented by B. Mahanna.

Q. You may state what was said to you and the other defendants in your presence in regard to the liability of defendants who signed said contract for more than the amount set opposite their respective names.

A. That signers would only be liable for the amount set opposite their names.

Q. Did B. Mahanna state to you regarding your liability and that of the other defendants under this contract after you had signed the same?

A. He did not.

Q. Did said Mahanna represent to you and the other defendants in your presence that in subscribing to the said paper that you
73 and the other defendants were simply signing for stock in an incorporated company? If so, state fully.

A. Yes; simply taking stock in a creamery.

Q. You may now state whether or not you signed said subscription paper relying upon the statements made to you and the other defendants by the said B. Mahanna as agent for the plaintiffs.

A. I did.

Q. You may now state whether you are acquainted with one D. F. Gibbons, who represented the plaintiff and was in Oakley, Kansas, the latter part of May, 1888.

A. Yes; I know him.

Q. You may now state if you had a conversation with him during the last part of last May, 1888, at Oakley, Kansas, in reference to the release of Willard Teft, one of the subscribers to said creamery contract, from further liability under this contract.

A. I did.

Q. Will you now state that conversation?

A. He said that Willard Teft had paid his subscription to the creamery contract and had received a receipt in full for the same and released from further liability.

Q. You may now state if you had any further conversation with Gibbons in reference to the release of any other defendants.

A. I did.

Q. You may now state that conversation.

A. He said he would release all who would pay their subscription fully from further liability to the contract on condition that the committee would accept the creamery. The ones that he released were Geissler, S. Stalons, Snyder & Snyder, George W. Doering, and myself.

Cross-examination:

Q. If B. Mahanna agreed with you to insert a clause in the contract limiting the subscribers to individual subscriptions,
74 why was the same not inserted prior to your signing the contract?

A. I had no such agreement with him.

Thereupon defendant rests.

75 And in rebuttal the plaintiff reads from the deposition the testimony of THOMAS RANKIN:

Q. Mr. Rankin, are you one of the plaintiffs in this action of Davis & Rankin against H. F. Geissler *et al.*, Oakley, Kansas?

A. Yes, sir.

Q. Are you one of the firm of Davis & Rankin?

A. Yes, sir.

Q. Of whom is the firm composed?

A. Mr. J. Davis and Thomas Rankin.

Q. Did your firm ever build a creamery at Oakley, Kansas, for sundry parties at that place?

A. Yes, sir.

Q. Was that creamery built on written or printed contract or verbal contract?

A. It was a printed and written contract.

Q. Where is that contract, do you know, Mr. Rankin?

A. We sent it to Porter & Hunter, of Leavenworth, Kansas; as far as I know, they now have it in their possession.

Q. By whom was this contract taken on behalf of Davis & Rankin and who represented them in soliciting for subscribers to that contract, if any one?

A. Mr. B. Mahanna.

Q. About what year was it, Mr. Rankin?

A. In the fall of '87.

Q. Who had charge of the correspondence at that time for the house of the firm of Davis & Rankin?

A. Mr. Davis had charge of our correspondence at that time.

Q. Did you use to look after the contracts that were sent in at that date?

A. Yes, sir.

Q. Did you see the contract that was taken by Mr. B. Mahanna at Oakley, Kansas?

A. Yes, sir.

Q. How did that contract get from Oakley, Kansas, here,
76 Mr. Rankin? Was that contract in one or two pieces of paper?

A. One piece.

Q. Were the specifications embodied in that one piece or were they attached or to be attached in one distinct piece of paper by itself?

A. The specifications were in the body of the contract and were all on the same piece of paper.

Q. Did Mr. Mahanna leave a copy of this contract with the Oakley subscribers?

A. It has always been our instruction to leave copies of all contracts with the subscribers, and it is always our custom to do so. When solicitors neglected to do it, we have always furnished them to subscribers if they requested it.

Q. Was Mr. Mahanna your general agent at that time, Mr. Rankin, or has he ever *ever* been since that time?

A. No, sir.

Q. Did you have any general agent at Oakley, Kansas, at that time?

A. No, sir.

Q. I will ask you, Mr. Rankin, whether or not he had any writ of power of attorney from your firm?

A. No, sir.

Q. Did you give him at any time any powers, written or spoken, that were not set out in the contract itself that the Oakley people signed?

A. No, sir; we did not.

Q. Mr. Rankin, in a deposition taken at Oakley, Kansas, by the defendants in this case, at a time previous to this, statements are made by various witnesses that Davis & Rankin agreed to hold each subscriber responsible only for the amount he subscribed. Is this true or false?

A. To the best of my knowledge, it is false.

Q. It is also stated, Mr. Rankin, by the same defendants, at the same date referred to in the previous question, that Davis & Rankin agreed to assume all the insolvent subscriptions, if any, or that might become insolvent or that might move away. I will ask you whether Davis & Rankin made such promises?

A. No, sir.

77 Q. Mr. Rankin, it has been stated, at the same time and place, by the same parties, that you offered to furnish all material that went into the establishment of the best, or first-class. Did you ever make such agreements and did you make them at Oakley?

A. We made no promises at Oakley, Kansas, that are not contained in the original contract, regarding the quality and grade of the lumber to be used in the construction of the creamery at Oakley, Kansas.

Q. Mr. Rankin, it has been stated, at the same time and place and by the same parties, that you agreed to insert in said contract that the defendants should only be held liable for the amount of the subscription set opposite their name-. Did you ever make such agreement?

A. We did not.

Q. It has been charged by these parties, at the same time and place, that you have released Willard Teft from any liability to this contract. Is that true?

A. It is not true, and, on the contrary, we have not released Willard Teft from any liability to the contract referred to.

Cross-examination:

Q. Mr. Rankin, did you have any conversation with Willard Teft in June, 1880, or about that time?

A. Mr. Willard Teft was in our office some time in the spring of '88.

Q. Did you or your partner attend to the business transacted with Willard Teft at that time?

A. Mr. Davis attended to the business transaction with Mr. Teft at that time.

Q. You were asked by your counsel whether anything in the way of extra agreements were embodied in the original contract. What do you mean by extra agreements, and what do you understand your counsel to mean by that term?

A. I mean that there were provisions in the contract in
78 writing that the Creamery Company were to furnish the land for the erection of the creamery building at Oakley, Kansas, for a specified amount.

Redirect testimony:

Mr. Rankin, counsel for the defense has asked you a question in his cross-examination as follows:

Q. "He is a subscriber, referring to Mahanna, to this contract, is he not?" I would now ask you, Mr. Rankin, what he referred to when he asked you this question; what he held in his hand when the question was asked, and what contract did the witness understand him to refer to when he asked that question?

A. The witness understood that he held in his hand either the original contract or a copy of the original contract, and if I was allowed to see it I would be able to determine whether said paper or contract was original.

Q. Mr. Rankin, having seen this paper submitted to you for inspection by counsel for defendant, I will ask you whether this is the original or a copy of the original contract?

A. I should call it a copy.

Q. I will ask you, Mr. Rankin, if you would state that this is an exact copy, to the best of your knowledge and belief, of the original contract?

A. To the best of my knowledge, it is a duplicate of the original contract.

Plaintiff now reads from the deposition of D. J. DAVIS as follows:

Q. State your name, age, occupation, and residence.

A. Daniel J. Davis; am 42; residence, Chicago; occupation, manufacturing creamery supplies and contracting for butter and cheese factories.

Q. How long have you been engaged in this business,
79 Mr. Davis?

A. About 12 years.

Q. In the early part of your business were you engaged in contracting for creamery-s or selling supplies, or both?

A. We were engaged in the manufacture and selling of supplies. We did not contract for creamery-s until about 6 or 7 years ago.

Q. Are you one of the plaintiffs in this action of Davis & Rankin *vs.* H. F. Geissler *et al.*, of Oakley, Kansas?

A. Yes, sir.

Q. Did you build and equip a creamery for the said defendants at Oakley, Kansas, some time in the latter part of the year '87 and

the early part of the year '88, either by yourselves in person or by your agents?

A. Yes, sir.

Q. Was this creamery built by your firm either as a firm or in person or was it built by your agents?

A. It was built by us as a firm, through our agents superintending the job.

Q. Were either you or your partner, Mr. Rankin, ever on the ground at Oakley, Kansas?

A. No, sir; I never was.

Q. Was Mr. Rankin ever there, to your knowledge?

A. No, sir.

Q. Mr. Davis, will you please state fully in your own way how this contract came to be taken at Oakley and by whom it was afterwards carried out, in the matter of building said creamery.

A. Our contract was taken through Mr. B. Bahanna, who solicited stock sufficient upon a written contract, and was built by Mr. Rodgers. I forget his initials.

Q. Mr. Davis, you say this was a written contract. Did you mean it is in writing or in print? State fully.

A. The body of the contract was in print, filled in with some writing.

Q. Mr. Davis, what was your custom and usage in the matter of your printed contracts at that time—how were they prepared
80 and by whom? When the blanks were first being prepared, how many were usually prepared at one time, in the way of blanks? By whom were they given to agents? State fully.

A. The contracts or blanks were prepared by myself and were approved by my partner, Mr. Rankin, and were printed in lots of 500 or more at one time, and given out to the agents by myself.

Q. Were these contracts, as to their texts, so far as the printing was concerned, different or alike?

A. Alike.

Q. Mr. Davis, how came you to know first that a contract had been closed by your agent, Mr. Mahanna, at Oakley, Kansas?

A. We received a contract through the mails from Mr. Mahanna with a letter from him.

Q. Mr. Davis, what was your custom and usage in the matter of passing upon the quality or rating of all contracts taken by your agents and from your business house in Chicago as to the matter of directing the details of the building?

A. When we receive a contract we look it over carefully, and we look the names up in the reports of Dunn or Bradstreet and others, and if the subscribers are rated favorably we file a copy of the contract and send it out to our builder, with instructions to carry the contract out to a letter.

Q. Was this course taken in the case of this particular contract at Oakley?

A. Yes, sir.

Q. Mr. Davis, was B. Mahanna at the time that he closed this contract at Oakley, Kansas, your agent? Did he hold your written

power of attorney, in which his scope was set out, or did he not? State fully.

A. Mr. Mahanna was indirectly our agent—that is, he worked on commission, paid his own expenses. If he got a contract that was approved of and accepted he was entitled to his money, and if it was rejected he got nothing. He had no power of attorney from us.

Q. Mr. Davis, I find a clause in your contract, hitherto
81 alluded to herein, that reads as follows: "And it is hereby understood that the said Davis & Rankin will not be responsible for any pledge or promises made by their agents that is not made a part of this contract and attached thereto, either printed or written." I will ask you to explain to this court the meaning of that clause and why it was so inserted as the latter text in your contract.

A. It means just what it reads. The object of our having that clause put at the bottom is so that a creamery subscriber would fully understand that we would not be responsible for any promise; that if there was any made that he would see that it was his duty to have the same in writing and attached thereto.

Q. Mr. Davis, what was the scope of Mr. Mahanna as a kind of agent, as heretofore alluded to in your testimony? State fully.

A. His scope was to take the blank contracts and solicit subscribers on the same wherever he found a community that wanted a creamery, and when he had the proper amount of subscribers on the blank he was to bring or forward the same to us, subject to our approval.

Q. Mr. Davis, did you or did you not direct from your office at Chicago all the details connected with the building and equipping and completing and collecting for the completed establishment as built, from the time you first approved the contract until you were furnished pay for the same? State fully.

A. Yes, sir.

Q. Mr. Davis, I will ask you if in settling with the various subscribers to this Oakley contract you attempted to first settle with them for several sums or did you at once seek to recover from each the gross sum on the face of the contract mentioned therein as the contract price in language as follows:

82 "Said Davis & Rankin agree to erect said creamery according to within plans and specifications for the sum of $5,000.00, payable in cash. We, the subscribers hereto, party of the second part, agree to pay the above amount for said creamery when completed, the subscribers agreeing to accept the same as soon as completed according to within plans and specifications; said creamery to be completed within 90 days after the amount is subscribed; all payments under this contract made payable to Davis & Rankin or their authorized agent."

I will now repeat the question: Did you seek to recover from each subscriber severally their subscription?

A. We did not seek to collect severally at first. We seek to collect from the company, and sometimes they have the money paid in to the trustees and paid to us through them, and if it is not paid

into the treasury the treasurer of the creamery company in collecting is sometimes assisted by the creamery company. He collects the money and gives the creamery company credit for the amount, and they collect it.

Q. Mr. Davis, what authority, if any, had J. C. Rodgers, your builder, to waive any conditions in your contract or to bind you in any way outside of just simply carrying out your instructions given him from time to time. State fully, and also state whether he had any written power of attorney.

A. He had no power of attorney from us. He had no authority to waive anything or make any changes without first consulting us.

Q. Now, Mr. Davis, by the word solicitor whom do you mean?

A. We mean the man we send that solicits the subscriptions for creamery stock.

Q. In this case at Oakley, Kansas, who was the man?

A. B. Mahanna.

Cross-examination by defendant-:

Q. When the contract in question was returned to you by Mr. B. Mahanna, how did it purport to be signed, so far as the
83 plaintiff was concerned or on the part of the plaintiffs?

A. "Davis & Rankin." Sometimes the solicitor attaches his name, so that we can distinguish them.

Q. Did this particular contract at that time bear the signature of either member of the plaintiffs' firm?

A. Yes, sir.

Q. Which member signed it?

A. I did not sign it. I don't know if Mr. Davis did.

Q. How can you testify, then, that it bore the genuine signature of either member of the plaintiffs' firm?

A. I didn't testify that it bore the genuine signature of either member of the plaintiffs' firm.

Q. It did not have the genuine signature of either member of the plaintiffs' firm at the time you first saw it; is that right?

A. It may have had Mr. Davis' signature. If I could see it I could tell. The contract speaks for itself.

Q. Mr. Davis, without any further parleying upon that question, you know, do you not, as a matter of fact that the signature of Davis & Rankin annexed to the alleged contract in question when it was first returned to you by B. Mahanna was "Davis & Rankin per B. Mahanna"?

A. There was a signature of Davis & Rankin to the contract. I do not remember now whether it was Davis & Rankin's own signature or whether it was written by B. Mahanna or B. Mahanna's name following. There was no "per," as I remember.

Q. Was the paper purporting to be the alleged contract signed by your firm name when it was first returned to you through the mail?

A. Our firm's name was signed to the contract when I first saw it.

Q. Was the signature the genuine signature of Mr. Rankin?
A. I cannot tell unless I can see it.

84 *Daniel F. Gibbons.*

Q. It is also stated by Mr. Doering that if David Doering, member of the building committee, would give you a written acceptance of the creamery that you would then and there accept the subscriptions of the different parties and give them a receipt in full and release them from further liabilities; that these parties are J. W. Doering, H. F. Geissler, and Doering & Doering and a few others; that you further said you could then get at the kickers. Did you make any such proposition?
A. No.
Q. Did you have any authority, Mr. Gibbons, from Davis & Rankin to make this proposition?
A. No, sir.

D. H. MAHANNA testifies as follows:

Q. Mr. Mahanna, you may state your name, age, place of residence, and occupation.
A. My name is B. Mahanna; 50 years old; 204 Oakland boulevard. My occupation, travelling salesman.
Q. What business were you engaged in in the fall of '87 and early spring of '88?
A. Selling creamery-s.
Q. Here at Oakley, Kansas?
A. Yes, sir.
Q. Did you sell a creamery to sundry persons here at Oakley, Kansas?
A. Yes, sir.
Q. Was it a written contract of sale you made with them or a verbal one?
A. A written contract—that is, a printed contract.
Q. You answer that it was a printed contract, Mr. Mahanna. Did you have a blank form of printed contract in your possession?
A. Yes, sir.
Q. By whom furnished?
A. Davis & Rankin.
Q. What did they specify on their face that it was to cost?
A. $5,000.00.

85 Q. Mr. Mahanna, were these blank forms of contract that were printed all alike?
A. Yes, sir.
Q. Were these blank forms of contract on separate, distinct pieces of paper or on many pieces to be attached together and form when so attached one contract?
A. No, sir.
Q. Do I understand, Mr. Mahanna, that they were not two or

three distinct, separate pieces of paper which attached together form one contract; is that it?

A. Yes, sir.

Q. Was the entire contract embodied in one piece of paper or was it not?

A. Yes, sir.

Q. Mr. Mahanna, did you at that time hold a written power of attorney from Davis & Rankin containing your duties as an agent?

A. No, sir.

Q. Did these sundry persons to whom you claim you sold a creamery at Oakley, Kansas, ask of you or demand of you a written power of attorney before they would deal with you?

A. No, sir.

Q. Mr. Mahanna, recently the defendants at Oakley, Kansas, gave their depositions in this case and the various witnesses were defendants in this action and testified to certain facts in connection with the statements made outside of written contract in suit herein. I desire to direct your attention to some of these statements as testified to by them. Have you met one J. W. Kerns, of Oakley, Kansas?

A. I think I did. I am not positive.

Q. Did you exhibit to J. W. Kerns for the purpose of inducing him to sign the written contract alluded to by yourself and submit to him certain plans and specifications that were not attached to the contract which he signed, but which you agreed to furnish later?

A. No, sir; the only plans and specifications were submitted in a public meeting.

Q. What were these plans that you speak of that were in
86 public meeting?

A. It was what we call "blue print."

Q. What were they taken from?

A. I don't know whether I can answer that question or not.

Q. What did these "blue prints" that you speak of contain on their face and what did they represent?

A. They contained pictures of the building that they were to have, as was embodied in the contract; that which they were to receive.

Q. What did these blue-print plans have upon their face in the way of description of lumber, of rafters and sills and shingles and studding and joice and flooring and all of the material that entered into the building at Oakley?

A. Nothing.

Q. Mr. Mahanna, did you leave a copy of the contract taken with these sundry persons at Oakley, Kansas?

A. Yes, sir.

Q. You say these plans contained nothing in the way of print on their face and nothing but a picture of the building and how it looked after completion was submitted at the public meeting. I will ask where this public meeting was held.

A. In a hall above a store.

Q. Was this before or after the contract was signed?

A. Before.

Q. Was there any writing on the face of this printed form of contract alluded to by yourself except the signature of the parties; if so, what was that language, as nearly as you can remember?

A. I think the contract was filled out with "Oakley, Kansas," to it, and they agree to give 200 dollars for the land. That's the best of my recollection.

Q. Mr. Mahanna, when was the contract filled out as you describe it? Was it before it was signed or after it was signed by
87 defendants herein?

A. Before.

Q. Did you ever agree with these defendants that each subscriber should only be liable for the amount he subscribed?

A. No.

Q. Did you ever say in language, the substance of which is as follows: "If any of you people become insolvent you won't have to pay anything, but Davis & Rankin will assume your bad stock"?

A. No.

Q. Did you ever tell them or either of them, in a public meeting heretofore alluded to by you or in private conversation, that if any of them moved away they would not have to pay anything?

A. No.

Q. In canvassing around after these defendants to sign this contract, did you go alone?

A. No, sir.

Q. Whose assistance did you have, if anybody's?

A. Mr. Doering's.

Q. There were a good many different Doerings. Which is this?

A. Mr. Doering nearest the bank, who owned the store; a small man.

Q. Mr. Mahanna, about how long were you around Oakley, Kansas, soliciting this contract?

A. Well, my impression is that I was there between a week and ten days.

Q. Did you make public canvasses for stock or were they secret? State fully in your own language just how you managed, from the time you begun to take subscriptions until you closed the contract.

A. I arrived at Oakley at midnight; called a meeting the next day of the business men to see whether they wanted a creamery or not. We had a meeting at night. All of the business men of the town were there and some that were not business. I showed
88 them my picture of the same kind that we built in all the different States, and at the same time I read them my contract, filled it out, got some 11 or 12 shares of stock that evening with the assistance of Mr. Doering, a banker, and others. I talked to the people in the public streets, in the bank, and in the country, where the balance of the stock was taken, except that which I took myself. When the stock was all taken, the contract closed, the ground picked out, and the building committee appointed, I think, I left Oakley.

Q. Who picked out the ground?

A. I forget the gentlemen's names.

Q. Why was a committee appointed?

A. When I arrived there Mr. Brown met me and took me to the bank to be interviewed in regard to the creamery. I made no promise or pledges but what was on the contract, except one man was to have a year's time on his stock. He was to give his note for one year, I think. His name was Kerns—I am not sure.

Q. Mr. Mahanna, would you remember what the name was exactly if your memory was refreshed?

A. Yes, sir.

Q. H. F. Geissler?

A. That was the man.

Q. Mr. Mahanna, you stated that the canvass for these subscriptions was all open and not secret, and that you had the assistance of the various townsmen, to whom you were referred and who are defendants in this case; were there any further publicities given, such as newspaper notes or anything of that nature? State fully as to all the representations made by you, whether false or otherwise, to induce these defendants into signing the contract.

A. The papers published, of which I have a copy, are those presented to me and speak of the creamery which was built at Oakley. As for getting the stock publicly, we had help from every man in town but one, and when I left Oakley they seemed to be perfectly satisfied to go on with the creamery.

Q. Did one L. A. Fisher sign the contract, Mr. Mahanna?

89 A. Yes, sir.

Q. Did he sign it in his own hand?

A. Yes, sir; on the show-case in the store.

Cross-examination:

Q. Are you still in the employ of Davis & Rankin or Davis & Rankin Manufacturing Company?

A. Yes, sir.

Q. Who placed the name of Davis & Rankin on that contract?

A. I did.

Q. You say that you gave Mr. Kerns a year's time on his stock?

A. Yes, sir.

Q. Who was present when that was done besides yourself and Mr. Kerns, if anybody?

A. There was somebody present. I cannot say now who it was.

Q. There was a special arrangement with Mr. Kerns, was it not?

A. Not a private arrangement; no, sir.

Q. I asked you whether it was a special arrangement.

A. I don't know how you consider it. I didn't.

Q. Did you make any such arrangement with any other subscriber?

A. Not to my knowledge.

Q. Was any such arrangement made at any time with any other subscriber?

A. Not that I remember.

Q. At what time did you make that arrangement with J. W. Kerns?

A. At the time he signed for the stock.

Plaintiff reads from the deposition of J. C. RODGERS as follows:

Q. State your name, age, place of residence, and occupation.

A. J. C. Rodgers; 57 years; place of residence, Bangor, Michigan; occupation, builder and carpenter.

Q. Mr. Rodgers, how long have you been engaged in busi-
90 ness as a carpenter and joiner?

A. I can't exactly tell—34 or 35 years.

Q. Did you ever work for Davis & Rankin, the plaintiffs in this case, and how long have you been in their employ?

A. Yes; I commenced working for them in 1886 and worked until December, 1888.

Q. Mr. Rodgers, have you had a large experience in building and contracting and of the quality of material that should enter into buildings, and the customs and usages among mechanics as to how a building and contract should be executed? State fully.

A. In experience in building, 30 years, I consider myself a pretty good judge of material. I consider that in a contract that does not specify, there should be used material of good common quality.

Q. Did you build the creamery at Oakley, Kansas, on the order of Davis & Rankin, plaintiffs in this case; if so, when?

A. I did. I commenced in January and February, 1888.

Q. Did you build said creamery according to the terms and conditions of a certain contract furnished you by Davis & Rankin? If so, state whether this contract was stipulated to you in words from the firm of Davis & Rankin in a face interview, or whether it was in letters written to you, or whether it was in printed and written form and signed in writing by sundry persons living at or near Oakley, Kansas.

A. Yes; I did. The contract was — printed and written form, signed by sundry parties residing at or near Oakley, Kansas.

Q. Would you recognize the form of contract to which you allude if it was submitted to you by the notary taking these depositions?

(Witness shown Exhibit "A" and the question asked by notary:)

Q. Is this the one?

A. Yes.

Q. Mr. Rodgers, how did this copy or contract come into
91 your possession; did it come directly from the house to you? State fully.

A. It came through the hands of Mr. D. M. Brown. I had directions from the house to call on him and get it.

Q. Mr. Rodgers, I will call your attention now to some language that I find written in the left-hand lower corner of the copy of the contract and specification identified by yourself, marked Exhibit "A;" which said language is as follows: "Stockholders agree to furnish land for said creamery for $200.00." I will ask you if that written language was contained in the copy of the contract and

specifications furnished you by Davis & Rankin when said contract came into your possession?

A. To the best of my knowledge and belief, it was in the copy furnished to myself when it came into my possession, in words just as they are there written and in the place and location on the contract as described by yourself in the question.

Mr. WOODBURY, an attorney and secretary of the Davis & Rankin Building & Manufacturing Co., was sworn as a witness for defendants. He testified that Mahanna lived in and was a citizen of Illinois; that Mahanna was employed by plaintiffs in procuring creameries to be built after the style of this and after the manner and on the same kind of contracts as the one in controversy; that he was allowed 15 % of the subscriptions he obtained if it went through; that if he made a subscription to any of them it was deducted out of his percentage. Mahanna's subscription to the creamery in this case had been paid and he owed the plaintiffs nothing on that score; that the Davis & Rankin Building & Manufacturing Co. was a corporation, and was the successor in business of Davis & Rankin, and owned the former business of Davis & Rankin, including the matter in suit.

The evidence of the parties was here closed and the cause submitted.

92 And thereupon, and upon his own motion and over the objection of the plaintiffs, the court refused to submit the cause to the jury on the pleadings and evidence and discharged the jury from the further consideration of the said cause.

To all of which ruling the plaintiff then and there duly excepted.

And the court then made and caused to be entered of record an order, of which the following is a copy, to wit:

DAVIS & RANKIN, Plaintiff, }
vs. } 6466.
H. F. GEISSLER *et al.*, Defendants. }

SATURDAY, *November* 28, 1891.

Now come the parties herein same as on yesterday, and, the jurors empanelled herein being called and all being present, the following further proceedings in said case were had, to wit:

After all the parties hereto had introduced their evidence and rested their case, it appearing to the court that this court has not jurisdiction of the subject-matter of this action, it is ordered that this case be, and the same is, dismissed at the costs of plaintiff.

To the discharging the jury and the entry of said order the plaintiffs then and there duly excepted.

And because the evidence, rulings, and proceedings on the trial of the said cause do not appear of record, the plaintiffs, Daniel J. Davis and Thomas Rankin, partners as Davis & Rankin, now present this their bill of exceptions, which contains all of the evidence offered and received or offered and excluded upon or relating to the

jurisdiction of the court of said cause and suit and of all objections to evidence made and the rulings of the court thereon and exceptions taken to such rulings and the order of the court made and the exceptions taken by the plaintiffs thereto and all other objec-
93 tions made and exceptions taken on such trial, and prays that the same be settled, signed, and filed and entered and made of record and a part of the record in the said cause and suit.

Corrections made and now O K. The judge can allow & sign the foregoing.

WILLCOCKSON & WATERS,
Att'ys for Def'ts.

June 6th, 1892.

This 26th day of September, A. D. 1892.

JOHN A. RINER, *Judge.*

Endorsed: No. 6466. Bill of exceptions. Filed Sept. 26, 1892. Geo. F. Sharitt, clerk.

94 In the Supreme Court of the United States.

DANIEL J. DAVIS and THOMAS RANKIN, Partners as Davis & Rankin, Plaintiffs in Error, *vs.* H. F. GEISSLER, JOHN P. SMITH, WILLIAM Huffman, David Doering, Jno. W. Rodgers, C. A. Smith, W. McDaniel, L. A. Fisher, J. W. Cast, J. J. Sears, J. W. Kerns, G. W. Doering, A. I. Hakes, Meredith Roberts, Jordan Tinsley, W. F. Sager, John A. Martin, Lawrence Doering, Willard Teft, W. Wise Carver, J. R. Humphreys, Edward Cleist, H. Sutherland, Doering & Doering, James Stalons, M. S. Ainslie, L. S. Stream, John Anderson, A. Simeton, Snyder & Snyder, C. W. Winslow, K. E. Willcockson, B. Mahanna, and E. Colvin, Defendants in Error.	No. 6466. Petition. In Error.

And now comes the plaintiffs in error and complain against the defendants in error for that at the November term, A. D. 1891, of the circuit court of the United States in and for the first division of the district of Kansas, held on the 4th Monday of November, A. D. 1891, to wit, on the 28th day of November, and during the said term, in a certain suit then pending in said court, wherein Daniel J. Davis and Thomas Rankin, partners as Davis & Rankin, these plaintiffs in error, were plaintiffs, and H. F. Geissler and others, these defendants in error, were defendants, the defendants in error herein, by the consideration of said court, recovered a judgment

against these plaintiffs in error dismissing the said suit and for the costs thereof, taxed at $—.

And these plaintiffs in error aver that there is manifest error in the record and proceedings of said court in said suit and judgment (which record is made a part of this petition in error and here-
95 with filed) in this, to wit, that by the record aforesaid it appears that the judgment was given for the defendants in error against these plaintiffs in error, whereas by the law of the land the said judgment ought to have been given in favor of these plaintiffs in error.

And there is manifest error in this, to wit, that the judgment rendered is not warranted by the facts shown by the evidence; and there is manifest error in this, to wit, that the findings and judgment of the law *is* not sustained by the facts proved; and there is manifest error in this, to wit, that the said judgment is contrary to law on the facts shown by the evidence.

Wherefore the plaintiffs in error pray this honorable court that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that the plaintiffs in error may be restored to all things which they have lost because of the said judgment, and that costs may be awarded to these plaintiffs in error.

T. A. HURD,
GEORGE SHIRTS,
JAMES A. WOODBURY,
WILLIAM A. PORTER,
Attorneys for Davis & Rankin, Plaintiffs in Error.

Endorsed: No. 6466. Davis and Rankin, pl'ffs in error, *vs.* H. F. Geissler *et al.*, def'ts in error. Petition in error. Filed Oct. 10, 1892. Geo. F. Sharitt, clerk. Hurd, Shirts, Woodbury and Porter, att'ys for pl'ffs in error.

96 In the Supreme Court of the United States.

Daniel J. Davis and Thomas Rankin, Partners as Davis & Rankin, Plaintiffs in Error, *vs.* H. F. Geissler, John P. Smith, William Huffman, David Doering, Jno. W. Rodgers, C. A. Smith, W. McDaniel, L. A. Fisher, J. W. Cast, J. J. Sears, J. W. Kerns, G. W. Doering, A. I. Hakes, Meredith Roberts, Jordan Tinsley, W. F. Sager, John A. Martin, Lawrence Doering, Willard Teft, W. Wise Carver, J. R. Humphreys, Edward Cleist, H. Sutherland, Doering & Doering, James Stalons, M. S. Ainslie, L. S. Stream, John Anderson, A. Simeton, Snyder & Snyder, C. W. Winslow, K. E. Willcockson, B. Mahanna, and E. Colvin, Defendants in Error.	No. 6466.

And afterwards, to wit, on the second Monday of October, A. D. 1893, at the October term of the said court, before the justices of the

Supreme Court, at the Capitol, in the city of Washington, came David J. Davis and Thomas Rankin, plaintiffs in error, by T. A. Hurd, George Shirts, J. A. Woodbury, and William A. Porter, their attorneys, and say that in the record and proceedings aforesaid in the circuit court of the United States in the district of Kansas, first division, in the suit aforesaid, wherein these plaintiffs in error were the plaintiffs and these defendants in error were the defendants, there is manifest error in this, to wit, that the findings and conclusions of law are not sustained by the facts as shown by the evidence on the trial.

That there is error also in this, to wit, that the judgment rendered by the court below is against the weight of evidence and is contrary to law.

97 That there is error in this, to wit, that by this record aforesaid it appears that the court below dismissed the said suit on his own motion, on the ground of a want of jurisdiction in the said court, when the evidence presented clearly shows the court had full jurisdiction of the subject-matter of said suit and the right to try and determine the same.

That the court below erred in withdrawing the said suit from the jury and dismissing the same over the objection of the plaintiffs below.

That there is error in this, to wit, that the rulings of the court and judgment in dismissing said suit *is* contrary to law and the findings of the court *was* against the evidence.

That there is error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid was given for the defendants in error against these plaintiffs in error, whereas by the law of the land said judgment ought to have been given to the plaintiffs in error against the defendants in error; and these plaintiffs in error pray that the said judgment may be reversed and altogether held for nothing and a new trial may be awarded, and that they may be restored to all things which they have lost by reason of said judgment.

T. A. HURD,
GEORGE SHIRTS,
JAMES A. WOODBURY,
WILLIAM A. PORTER,
Attorneys for Plaintiffs in Error.

Endorsed: No. 6466. Davis and Rankin, pl'ffs in error, *vs.* H. F. Geissler *et al.* Assignment of error. Filed Oct. 10, 1892. Geo. F. Sharitt, clerk. Hurd, Shirts, Woodbury and Porter, att'ys for pl'ffs in error.

98 Know all men by these presents that we, Davis and Rankin, as principal-, and John W. Crancer, of Leavenworth, Kansas, as surety, are held and firmly bound unto H. F. Geissler *et al.*—that is, the defendants in case # 6466, U. S. circuit court for the first division of the district of Kansas—in the full and just sum of two hundred and fifty dollars, to be paid to the said H. F.

Geissler *et al.*, the defendants in case # 6466, U. S. circuit court for the first division of the district of Kansas, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the November term, A. D. 1891, of the circuit court of the United States for the first division of the judicial district of Kansas, in a suit depending in said court between Daniel J. Davis and Thomas Rankin, partners as Davis and Rankin, plaintiffs, and H. F. Geissler *et al.*, defendant-, judgment was rendered against the said Davis and Rankin; and the said Davis and Rankin, the plaintiffs, *have* obtained a blil of exceptions of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said H. F. Geissler *et al.*, citing and admonishing them to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Davis and Rankin, the plaintiffs, shall prosecute said bill of exceptions to effect and answer all damages and costs if they fail to make good their bill of exceptions, then the above obligation to be void; else to remain in full force and virtue.

DAVIS AND RANKIN, [SEAL.]
By WILLIAM A. PORTER, [SEAL.]
Their Att'y.
JOHN W. CRANCER. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
JOHN A. RINER, *Judge.*

99 [Endorsed:] No. 6466. United States circuit court, first division of the judicial district of Kansas. Davis & Rankin *vs.* H. F. Geissler *et al.* Bond, $250.00. Filed 13th day of Oct., 1892. Geo. F. Sharitt, clerk.

100 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings in said court in the action of Daniel J. Davis and Thomas Rankin, partners, trading and doing business under the firm name and style of Davis & Rankin, plaintiffs, *vs.* H. F. Geissler and others, defendants, number 6466, excepting the summons with the marshal's return thereon and the motion of defendants to dismiss for want of jurisdiction, which papers are missing from the files. I further

certify that the original writ of error and original citation are returned herewith and made a part of this transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 21st day of October, A. D. 1892.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

GEO. F. SHARITT, *Clerk.*

Endorsed on cover: Case No. 15,203. Kansas C. C. U. S. Term No., 474. Daniel J. Davis & Thomas Rankin, partners, doing business as Davis & Rankin, plaintiffs in error, *vs.* H. F. Geissler, John P. Smith, William Huffman, *et al.* Filed November 11, 1892.

Office Supreme Court U. S.
FILED.
MAR 16 1896
JAMES H. McKENNEY,
CLERK.

(15,203.)

Supreme Court of United States.

October Term, 1895.

No. 185.

DANIEL J. DAVIS AND THOMAS RANKIN,
PARTNERS, DOING BUSINESS AS
DAVIS & RANKIN,
Plaintiffs in Error,

vs.

H. F. GIESSLER, JOHN P. SMITH,
WILLIAM HUFFMAN, ET AL.,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS.

E. A. McMATH,
Attorney for Defendants in Error.

W. C. OLIVER,
Of Counsel.

FRANKLIN PRINTING HOUSE, (A P S) HOUSTON.

certify that the original writ of error and original citation are returned herewith and made a part of this transcript.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 21st day of October, A. D. 1892.

GEO. F. SHARITT, *Clerk.*

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS.

STATEMENT OF CASE

This case was brought to this court on a writ of error to the Circuit Court of the United States for the District of Kansas, to review a judgment in favor of the defendants in error, in an action brought in that court by Davis and Rankin as plaintiffs, for damages for breach of contract.

The defendants duly appeared and answered in the action, among other matters alleging that the Circuit Court had no jurisdiction of the subject matter of the action. (See 7th defense, record, p. 11.)

The case was tried in November, 1891, and the Circuit Court, after hearing the evidence, dismissed the case on motion of the defendants upon the ground that it had no jurisdiction of the subject matter of the action, and rendered judgment for defendants in error. (See record, page 59.)

The writ of error was granted Oct. 13, 1892. (See record, page 2.)

There is an assignment of errors in the record, (pp. 61–62,) but no certificate from the Circuit Court presenting the question of its jurisdiction to this court.

The defendants in error now submit herewith a motion to dismiss upon the following grounds, as set forth in their motion:

"1. This court has no jurisdiction in this case.

2. This case is brought to this court directly from the Circuit Court of the United States for the District of Kansas, and can be heard solely upon the question of the jurisdiction of said Circuit Court, but the plaintiffs in error have failed to obtain from said Circuit Court any certificate presenting the question of its jurisdiction to this court for determination, as required by the statute and by the rules of this court in such case made and provided, and this court cannot review this case upon that question."

ARGUMENT.

This case is within Section Five of the Judiciary Act of March 3d, 1891, and could be brought to this court directly from the Circuit Court only upon the question of the jurisdiction of that court.

But that section provides that "in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." There is in this case no certificate from the court below.

Accordingly no course is left open to this court but to dismiss the writ of error for want of jurisdiction. Any discussion of the question is rendered unnessary by the recent decisions of this court, wherein it was held that in such case a certificate by the Circuit Court presenting the question of the jurisdiction of the court below for the determination of this court is explicitly and in terms required, in order to invoke the exercise by this court of its appellate jurisdiction, and that the absence of such certificate is fatal to the maintenance of an appeal or writ of error in this court.

Maynard vs. Fecht, 151 U. S., 324.
Colvin vs. City of Jacksonville, 157 U. S., 368.
Davis & Rankin Bldg. & Mfg. Co. vs. Barber, 157 U. S., 673,

The motion to dismiss should be granted.

E. A. McMATH,
Attorney for Defendants in Error.

W. C. Oliver.
Of Counsel.

FILED.
SEP 21 1896
JAMES H. McKENNEY,
CLERK.

(15,203.)

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

No. ~~474~~ 185

DANIEL J. DAVIS AND THOMAS RANKIN, PARTNERS,
DOING BUSINESS AS DAVIS & RANKIN,
Plaintiffs in Error,

vs.

H. F. GEISSLER, JOHN P. SMITH, WILLIAM HUFFMAN
ET AL.,
Defendants in Error.

In Error to the Circuit Court of the United States in and for the District of Kansas.

BRIEF OF PLAINTIFF IN ERROR.

D. P. STUBBS,
Attorney for Plaintiff in Error,
FAIRFIELD, IOWA.

W. F. RIGHTMIRE, ESQ.,
Of Counsel in Brief,
TOPEKA, KANSAS.

BARNARD & MILLER, PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

No. 474.

OCTOBER TERM, A. D. 1894.

DANIEL J. DAVIS and THOMAS RANKIN, Partners, doing business as DAVIS & RANKIN,
Plaintiffs in Error,
vs.
H. F. GEISSLER, JOHN P. SMITH, WILLIAM HUFFMAN, DAVID DOERING, JNO. W. RODGERS, C. A. SMITH, W. McDANIEL, L. A. FISHER, J. W. CAST, J. J. SEARS, J. W. KERNS, G. W. DOERING, A. I. HAKES, MEREDITH ROBERTS, JORDAN TINSLEY, W. F. SAGER, JOHN A. MARTIN, LAWRENCE DOERING, WILLIARD TEFT, W. WISE CARVER, J. R. HUMPHREYS, EDWARD CLEIST, H. SUTHERLAND, DOERING & DOERING, JAMES STALONS, M. S. AINSLEY, L. S. STREAM, JOHN ANDERSON, A. SIMETON, SNYDER & SNYDER, C. W. WINSLOW, K. E. WILCOCKSON, B. MAHANNA, and E. COLVIN,
Defendants in Error.

No. 15,203.

ABSTRACT.

On March 12, 1890, the plaintiffs in error filed their petition in the court below, against the defendants in error, alleging:

That plaintiffs in error are residents and citizens of the State of Illinois, that each and all of the defendants in the action are residents and citizens of the State of Kansas, and that the amount in controversy in the action exceeded the sum of two thousand dollars.

That upon the 23d day of November, 1887, the parties

to the action entered into a written contract—a copy of which said contract is attached as an exhibit and made a part of the petition—by the terms of which said contract, the plaintiffs were to build, erect, and equip for the defendants, at or near Oakley, Kansas, a creamery of the size, dimensions, character and capacity specified in the contract.

That by the terms of the said contract, the defendants agreed to pay to the plaintiffs for the construction and erection of the said creamery five thousand dollars.

That the plaintiffs erected, completed and put the said creamery in operation in full compliance with the terms of the said contract; and had received upon the contract purchase price of the creamery, the sum of one hundred dollars, but the defendants refused to pay the balance of the contract purchase price in the sum of forty-nine hundred dollars, for which amount with interest and costs, the plaintiffs demanded judgment. (Record, pp. 3–7.)

To this action thus begun, no appearance was ever entered for the following named defendants, to wit: W. McDaniels, J. W. Cast, W. F. Sager, John A. Martin, Lawrence Doering, Willard Teft, Edward Cliest, M. S. Ainslie, L. S. Stream and B. Mahanna, but the defendants in error, H. F. Geissler, John P. Smith, William Huffman, David Doering, John W. Rodgers, C. A. Smith, L. A. Fisher, J. J. Sears, J. W. Kerns, G. W. Doering, A. I. Hakes, Meredith Roberts, Jordan Tinsley, W. Wise Carver, J. R. Humphreys, Doering & Doering, H. Sutherland, James Stalons, John Anderson, A. Simonton, Snyder & Snyder, K. E. Wilcockson, and E. Colvin filed their joint answer, July 29, 1890, pleading as defenses to plaintiffs' petition, a modified general denial and twelve other so-called defenses, to wit:

That contract had been fraudulently changed after execution; that defendants never accepted of completed creamery; that creamery was not erected in accordance with the plans and specifications of the contract, damaging defendants to the extent of $5,000. That court had no jurisdiction, because Mahanna, named as one of the defendants in the petition, was a co-citizen of the State of Illinois with the plaintiffs; want of jurisdiction, because Agent Mahanna's subscription to stock of the creamery was secretly the subscription of the plaintiffs, and plaintiffs in no event could join themselves as plaintiffs and defendants in the same action; contract entered into was fraudulent, differing from the oral promises of agent at time of making and execution; that plaintiffs had executed a release to one of the co-obligors to the contract, and therefore all were released; that one subscription to the contract is a forgery, and therefore all the subsequent subscriptions were obtained by fraud; that no subscriber to contract should be held liable for more than the plaintiffs received from the one released, and therefore no one was liable for a sufficient amount to give the court jurisdiction; and the prayer demanding a judgment for damages in the sum of $5,000 from plaintiffs, and costs of suit. (Record, pp. 8–14.)

Plaintiffs file reply August 20, 1890, denying all averments and allegations of defendants' answer. (Record, p. 15.)

At the November, 1891 term of the said Circuit court of the United States, for the District of Kansas, on November 27th and 28th, this cause of action was presented to a jury, and at the close of the trial, after each party had introduced all of its evidence, and rested its case, the court dismissed the case at plaintiffs' cost, and entered the following order, to wit:

Davis & Rankin, *Plaintiffs*,
vs.
H. F. Geissler *et al.*, *Defendants*. } 6466.

SATURDAY, November 28, 1891.

Now come the parties herein same as on yesterday, and, the jurors empaneled herein being called and all being present, the following further proceedings in said case were had, to wit: After all the parties hereto had introduced their evidence and rested their case, it appearing to the court that this court had not jurisdiction of the subject-matter of this action, it is ordered that this case be, and the same is dismissed at the costs of the plaintiff. (Record, p. 18.)

To this ruling and order of the court the plaintiffs in error, at that time plaintiffs, duly excepted, and took their exception to the rendition of a judgment for costs against them.

The plaintiffs in error in due time prepared and presented their bill of exceptions, and in compliance with the custom of the court below, served the same upon the attorneys for the defendants in error for approval, as it is an unwritten rule of the court below to sign and settle no bill of exceptions until the same has been approved by opposing counsel, and the counsel for the defendants in error retained and withheld said bill of exceptions for corrections until the 6th day of June, 1892, when they endorsed the same as follows, to wit:

"Corrections made and now O. K. The judge can "allow and sign the foregoing."

WILCOCKSON & WATERS,

Att'ys for Def'ts.

June 6th, 1892. (Record, p. 60.)

And thereafter upon the 26th day of September, A. D. 1892, the presiding judge at the trial granted, allowed, approved and signed the bill of exceptions with the following endorsement, to wit:

"This 26th day of September, A. D. 1892.

(Record, p. 60.) "JOHN A. RINER, *Judge.*"

ERRORS ASSIGNED.

That the judgment rendered by the court below is against the weight of evidence and contrary to law.

That the court below erred in dismissing the suit upon his own motion on the ground of a want of jurisdiction over the subject-matter of the action, when the record and the evidence presented clearly show that the court had full jurisdiction of the subject-matter of said suit, and the right to try and determine the same.

That the court below erred in withdrawing the said action from the jury and dismissing the same over the objections of the plaintiffs below.

That the rulings of the court and judgment in dismissing said suit are contrary to law, and the findings of the court are against the weight of evidence.

That the court below erred in rendering judgment for the defendants in error against the plaintiffs in error for the costs of the action. (Record, p. 62. Petition in error.)

ARGUMENT.

In considering the errors assigned in the petition in error, the plaintiff in error has been unable to find any cause for the decision of the court below, that it did not have jurisdiction of the subject-matter of the action before it, on the ground that it did not "have jurisdiction," as the amount of recovery demanded by the plaintiff in error in the court below is $4,900 with interest, and the defendants in error ask judgment against the plaintiff for damages in the sum of $5,000, most surely the amount in controversy was sufficient in amount to vest jurisdiction in the Circuit court of the United States.

Both parties to the action concede that the plaintiffs are citizens of the State of Illinois, and the answering defendants, citizens of the State of Kansas. Surely, this is the diverse citizenship contemplated by the laws of Congress, that is required to vest jurisdiction in the United States Circuit court. While the defendants set up as a defense, that one B. Mahanna, named as a defendant in the petition, is a citizen of the State of Illinois, with plaintiffs, and Mr. Woodbury, a witness for the plaintiffs, testified at the trial that Mahanna is a citizen of Illinois; he also testified that the said Mahanna had made full and complete settlement of his indebtedness to the plaintiffs, with the plaintiffs, and owed nothing, and the record nowhere discloses that any service of process was ever made upon Mahanna, or upon Williard Teft, who is also named as a defendant in the caption of the petition, who had also made payment of a portion of his indebtedness to the plaintiffs, or that Teft or Mahanna ever appeared in the action otherwise than in testifying in depositions as wit-

nesses, nor does the record disclose any attempt upon the part of either Teft or Mahanna to controvert the plaintiffs' claim for payment of the balance of the contracted purchase price of the creamery.

The record fully and completely setting forth the jurisdiction of the Circuit court, at least by a *prima facie* case: "The burden of proof rests upon the defendants "to divest the court of its jurisdiction."

Sheppard v. *Graves*, 14 How., 505 and 512.

"Objections to jurisdiction upon the ground of citi- "zenship, in actions at law, can only be made by a plea "in abatement; after the general issue, it is too late. If "a plea in abatement is filed with the general issue. the "later waives the former."

De Sobry v. *Nicholson*, 3 Wall., 420.

The defendants in error having pleaded the general issue in the opening of their answer in the general denial pleaded, and having thus debarred themselves from raising the question of jurisdiction, did not their pleading estop the court from raising the question which the defendants could not?

Were Teft and Mahanna necessary parties defendant, whose absence from the record debarred the plaintiffs in error from proceeding against the other defendants who had been served with the process of the court?

"Where one or more defendants sued were citizens of "one state, and were jointly bound with citizens of other "states who did not appear, the plaintiff had a right to "prosecute his suit against those served."

"The plaintiff may sue in the Circuit court any of the

"defendants, although others may be jointly bound by "the contract who are citizens of other states."

Clearwater v. *Meredith*, 21 How., 489.

"Where objection is taken to the jurisdiction of the "Circuit court by reason of the citizenship of some of "the parties to the suit, the question is whether they are "indispensable parties? If their interests are severable "from those of other parties and a decree without preju- "dice to their rights can be made, the jurisdiction of the "court should be retained and the case dismissed as to "them."

Horn v. *Lockhart*, 17 Wall., 570.
Cameron v. *McRoberts*, 3 Wheat., 591.
Mallow v. *Hinde*, 12 Wheat., 193.
Shields v. *Barrow*, 17 How., 130.
Inbush v. *Farwell*, 1 Black., 566.
Barney v. *Baltimore*, 6 Wall., 280.

Under the rule of the decisions hereinbefore cited, the plaintiff in error contends that nothing connected with either Teft or Mahanna, or both of them together, would be sufficient to divest the Circuit court of its jurisdiction, as neither of them was in any manner a necessary party to the record to give the Circuit court jurisdiction, under the authority of the decisions of this court, and the testimony adduced in the trial conclusively establishes that neither Teft nor Mahanna were necessarily interested in the outcome of the suit.

The subject-matter of the action is a Kansas contract to be construed by the laws of the State of Kansas, and the relations of all the parties to the contract are to be determined by the provisions of those laws, which, among other things, provide as follows, to wit:

1. "All contracts which by the common law are joint "only shall be construed to be joint and several."

2. "In all cases of joint obligations and joint as- "sumptions of co-partners and others' suits may be "brought and prosecuted against any one or more of "those who are so liable."

3. "Any person jointly or severally liable with others "for the payment of any debt or demand may be re- "leased from such liability by the creditor, and such re- "lease shall not discharge the other debtors or obligors "beyond the proper proportion of the debt or demand "for which the person released was liable."

General sections 1,098, 1,101 and 1,102, General Statutes of the State of Kansas, 1889.

Sections 1, 4 and 5, Chap. 21, Laws of 1868.

1. "Whenever any co-partnership firm shall dissolve "by mutual consent or otherwise it shall be and may be "lawful for any one or more of the individuals who was "or were embraced in said copartnership firm to make "a separate composition or compromise with any one or "all of the creditors of such copartnership firm; and "such composition or compromise shall be a full and ef- "fectual discharge of the debtor or debtors making the "same, and *to them only*, of and from every liability to "the creditor or creditors with whom the same is made "or incurred by reason of his or their connection with "such copartnership firm."

2. "Such composition or compromise with an indi- "vidual member of a firm shall not be construed as to "discharge the other copartners, nor shall it impair the

"the right of the creditor to proceed at law or in equity "against the members of such copartnership firm as "have not been discharged; and the member or mem- "bers of such copartnership firm so proceeded against "shall be permitted to set off any demand against said "creditor or creditors which could have been set off had "such suit been brought against all the individuals com- "posing said firm; nor shall such compromise or dis- "charge of an individual composing the firm prevent the "other members of such firm from availing themselves "of any defense at law or in equity that would have "been available had not this act been passed, except "that they shall not set up the discharge of one indi- "vidual as a discharge of the other copartners, unless it "were intended that all were to be discharged.

3. "Such compromise or composition of an individ- "ual of a firm with a creditor of the firm, shall in no- "wise affect the right of the other copartners to call "upon the individual making such compromise for his "ratable proportion of such copartnership debts, the "same as if this law had not been passed.

4. "The above provisions in reference to the co- "partners of a firm shall extend to joint debtors, who "are hereby authorized, individually, to compound or "compromise for their joint indebtedness, with the like "effect in reference to creditors and to joint debtors of "the individual so compromising, as is above provided "in reference to co-partners."

General Sections 3,998, 4,000, 4,001 and 4,002, General Statutes of Kansas, 1889, and Sections 1, 3, 4 and 5, Chap. 41, Laws of Kansas, 1866.

Mahanna having complied with the laws of Kansas, and compromised with his creditors, the plaintiffs in error, he under no circumstance could have been an indispensible party to the record, and therefore his citizenship could in no manner affect the jurisdiction of the Circuit court.

As for the claim in the eleventh so-called defense of defendant's answer that "the plaintiffs of their own mo- "tion have released and discharged a subscriber to said "pretended contract, one Williard Teft, from all liability "thereon, and that by such agreement and discharge these "defendants and each of them are wholly discharged "from all liability on such pretended contract; or for no "more at the farthest individually than the sum paid, if "any, by said Teft; that by reason of such discharge "these defendants can not and ought not to be held in "any event for more than the amount received from "Teft, and which these defendants ask might be ascer- "tained, and if, when ascertained, the same shall be "found to be less than two thousand dollars, which these "defendants aver it was, then this court should no lon- "ger retain jurisdiction of the subject-matter of this con- "troversy or of the persons of these defendants." (Rec., 13.)

Even if the plaintiffs in error had released Teft absolutely from all liability to them under the contract upon a compromise of his indebtedness under the contract, it would in nowise have released the answering defendants, under the law of Kansas hereinbefore cited, but the setting up of such a release by any one of the joint debtors is expressly phohibited by the latter portion of General Section 4,000 (lately hereinbefore cited), of the laws of Kansas, and yet the testimony relating to the discharge

of Teft, and his release from liability is not conclusive. David Doering testifies in his deposition, that one Gibbons, an agent of the plaintiffs, had told him that Teft had been released (Rec., 47), yet Rankin, one of the plaintiffs, in his deposition, says Teft had not been released (Rec., 49), and Teft, himself, in his deposition, testifies that he has not been released. (Rec., 30.)

Under the laws of Kansas hereinbefore cited the only effect the release of both Teft and Mahanna could have had upon the liability of the other defendants would be to reduce the amount of their joint liability from $5,000 to $4,100, by the amount they had both paid, $900, still giving an amount amply sufficient to give the Circuit court jurisdiction.

But the laws of Kansas further provide: "Issues of "law must be tried by the court, unless referred. Is- "sues of fact arising in actions for the recovery of "money, or of specific real or personal property, shall be "tried to a jury, unless a jury trial is waived, or a ref- "erence be ordered as hereinafter provided."

General Statutes of Kansas, 1889, Gen. Sec. 4,361.

If the discharge of Teft and Mahanna could in any manner be material in determining the jurisdiction of the court as to the subject-matter of the action, such releases are disputed facts, and questions which the court had no authority to decide, but were issues solely for the determination of the jury. The defenses of fraudulent representations of the plaintiffs' agent Mahanna, as well as failure to comply with plans and specifications of the contract, set forth in defendants' answer, were questions of fact for the jury, as "Fraud is

" never presumed, but must be proven," and which the court could not arbitrarily determine for itself.

The plaintiffs in error contend that all of the other so-called defenses of the defendants' answer were and are immaterial to the issues joined, because the allegations of the so called defenses, and the greater portion of the testimony offered by the defendants, are but an attempt to vary a written contract by parol testimony, and against the rule of law in such cases made and provided. In support of this contention we cite:

" When parties have deliberately put their engage-
" ments into writing in such terms as to import a legal
" obligation, without any uncertainty as to the object or
" extent of such engagement, it is conclusively pre-
" sumed that the whole engagement of the parties and
" the extent and manner of their undertaking, was re-
" duced to writing; and all oral testimony of a previous
" colloquium between the parties, or of conversations or
" declarations at the time when it was completed, or
" afterwards, as it would tend in many instances to
" substitute a new and different contract for the one
" which was really agreed upon, to the prejudice, pos-
" sibly, of one of the parties, is rejected."

1 Greenleaf, Sec. 275, 13th Ed.

The Supreme court of Kansas in 46 Kansas, in applying and adopting this rule to Kansas Contracts, also cite and approve the rule of the Iowa Supreme court, to wit:

" All agreements and negotiations, preliminary to the
" written contract are merged therein."

McKinney v. *Herrick*, 66 Iowa, 414,

and held in an action upon a promissory note that had been given as a part of the purchase price of a flock of

sheep, wherein the defense was the express oral warranty of the soundness of the sheep, but this warranty had not been inserted in the written bill of sale, that oral evidence in relation to the warranty should be excluded, the presumption of law being that the written instrument contained the whole contract, and the written contract should govern, unless fraud was alleged and proved.

Williard v. *Ostrander*, 46 Kas., 591.

Applying the exception to the rule, as provided by the Kansas Supreme court in the last clause of the citation above: "The written contract should govern unless fraud "is alleged and proved," while condeding that the defendants' answer bristles with allegations of (fraud shall we say? no), fraudulent representations and oral promises made by the agent, Mahanna, differing from the printed contract, yet every one of the defendants executed that contract voluntarily, with the next to the last clause of the contract he was signing staring him in the face and giving him warning, not to rely on any promise of the agent not in writing, upon the contract, in these words, to wit: "And it is hereby understood that the "said Davis and Rankin will not be responsible for any "pledges or promises made by their agents, that are not "made a part of this contract and attached thereto, "either printed or written." (Rec., 6.)

While the plaintiff in error might contend with good grace, that this clause in the contract would estop the defendants from offering any testimony or raising any question about the written contract executed, differing from the oral contract they claim they made with the agent at or prior to the time of executing the written contract, yet waiving this phase of the question, and

granting that the question was properly a question of fact to be determined in the trial, it was a question that the jury alone could properly determine under the laws of Kansas, and it was most manifest error for the court below to invade the province of the jury by withdrawing this question from the jury, if he based his decision upon those allegations of the defendants' answer and the evidence in support thereof.

If the decision of the learned trial judge, that the Circuit court did not have jurisdiction of the subject-matter of the action, could not rest upon any one, or all of the questions thus far presented by the petition, answer, reply and evidence of the parties, then the decision must have been based upon the construction he placed upon the written contract between the parties to the action, and if so, it could only be based upon the contract, upon the theory, that the contract was a distinctly several contract, *per se*, and that each one of the defendants was liable to plaintiffs only for the amount of stock he subscribed for, in the proposed corporation that the defendants might create, by the adoption of articles of incorporation under the laws of the state, and we will, therefore, carefully consider the contract and ascertain if such a construction of the contract would be the proper one under its plain terms.

The Contract.

In the consideration of the contract, what rule should govern the Circuit court? The plaintiff in error contends that the rule adopted by the Supreme court of Kansas, and by this Supreme court, should be the governing rule for the Circuit court.

In the case of *Firman* v. *Blood et al.*, 2 Kansas, 496,

the Supreme court adopts the rule of *Greenough* v. *Smead*, 3 Ohio St., 416: "That such a construction should be "placed upon the contract as will prevent its failure, and "will give effect to the obligation of each of the parties "appearing upon it, at the moment the contract itself "takes effect," and this rule remains the rule of the Supreme court of Kansas to-day, unchanged by any subsequent decision, which is in effect the same rule of interpretation that has been followed by this court in the following cases, to wit:

"It is a cardinal rule in the consideration of all con-"tracts, that the intention of the parties is to be in-"quired into, and if not forbidden by law (the inten-"tion) is to be effectuated."

Bradley v. *Washington A. & G. Steam Packet Co.*, 13 Pet., 89.

Chesapeake & O. Canal Co. v. *Hill*, 15 Wall., 94.

"In the construction of all written instruments to as-"certain the intention of the parties is the great ob-"ject of the court."

Mauran v. *Bullus*, 16 Pet., 528.

"The main rule of interpretation of a contract is to "ascertain what the parties themselves meant and un-"derstood."

Chenango Bridge Co. v. *Binghamton Bridge Co.*, 3 Wall., 137.

"The parties, if competent and willing to contract, "are the only proper judges of the motive or considera-"tion operating upon them."

Eyre v. *Potter*, 15 How., 42.

Is the Contract Joint or Several?

The plaintiffs in error contend that the contract between them and the defendants in error is the joint obligation and promise of the said defendants in error to pay to the plaintiffs in error the sum of $5,000 for the erection and completion of a creamery for the defendants, jointly, at or near Oakley, Kansas. (Rec., 5.)

The contract contains the covenant of the plaintiffs in error, as party of the first part, to erect and put in operation, for the parties of the second part, a creamery, according to the plans and specifications contained therein, which are made a part of the contract, for the sum of five thousand dollars, payable in cash; while the covenants of the defendants in error, as parties of the second part, "We, the subscribers hereto, parties of the "second part, agree to pay the above amount (not the "amount of stock we subscribe for, or the sum of money "we place after our names, but *the above amount*) for "said creamery when completed; the subscribers agree-"ing to accept the same as soon as completed to within "plans and specifications." (Rec., 6.)

Then follows a provision that after the full amount of $5,000 is subscribed, or in a reasonable time thereafter, the said subscribers may (not must or shall, but *may*) incorporate under laws of the state, and provide in articles of incorporation and by-laws that the private property of the stockholders of the corporation, when created, shall not be liable for corporate indebtedness, except the indebtedness created by the contract, and to be paid to the party of the first part.

The above are the main covenants of the contract en-

tered into between the parties to the contract, and although each of the defendants in error in executing the contract upon his part, also signified the number of shares of, and the amount of stock, he would take if the corporation should afterwards be formed under the laws of the State of Kansas, such signification has no bearing upon the covenant to pay the plaintiffs in error, jointly, the sum of $5,000 for the erection of the creamery, and if it was the intent of the defendants to be bound only for the amount each subscribed, in providing that their private property should be exempt from corporate indebtedness, except the indebtedness of the purchase price of the creamery, why was not this provision extended, so that only the proportionate share of each would be a charge upon the private property of each? That the defendants in error considered their contract joint was manifested by them when they stored ice in the ice-house of the creamery jointly (Rec., 31), and had they complied with their covenant and jointly or individually paid the purchase price of the creamery, and never formed a corporation, their ownership of the creamery must unquestionably under the contract have been a joint and undivided ownership.

The defendants themselves considered their contract a joint contract, and not a several one, for nearly three years.

The contract was executed upon the 23d day of November, 1887, and the defendants joined issue by filing their answer on July 29, 1890. (Rec., 6, 14.)

In the answer filed by the defendants in error, they in no one of the thirteen attempted defenses pleaded by them, set up as a defense that the contract was several and not joint, but all of the answering defendants join in

a joint answer and urge joint defenses, and jointly demand a judgment for damages against the plaintiffs in error in the sum of five thousand dollars, and the only intimation made in said answer of the severalty of the contract is in the eleventh defense, where they ask if the court finds that Teft has been released, that the court shall apportion the indebtedness, and fix the amount due from each, and if the proportion found due from each, as claimed, will be found to be (the amount each defendant had subscribed? no) insufficient in amount to give the court jurisdiction, "that by reason of such discharge "these defendants can not and ought not to be held in "any event for more than the amount received from said "Teft," and if that is not sufficient for each to give jurisdiction to the court, the defendants should be discharged. (Rec., 13.)

Conclusion.

The contract having been interpreted and construed as a joint contract by both the plaintiffs in error, and by the defendants in error, the court below could give it no other interpretation, if it followed the rule of decision of this court.

"Courts will not assume to make a contract for the "parties which they did not choose to make for them-"selves."

Morgan Co. v. *Allen*, 103 U. S., 515.

Even had there been any uncertainty in the plain terms of the contract, yet the Circuit court should have given it the interpretation the contracting parties placed upon it under the rule of this court.

"Where the language of a contract is of doubtful con-

"struction, the interpretation of the parties themselves "is entitled to great weight."

Chicago v. *Sheldon*, 9 Wall., 50.
Lowber v. *Bangs*, 2 Wall., 728.
Philadelphia W. & B. R. Co. v. *Trimble*, 10 Wall., 367.
Steinbach v. *Stewart*, 11 Wall., 566.

If the learned Circuit Judge, therefore, held that the contract is a several contract, and not a joint contract in its terms, and therefore the amount due from each was but the amount of the subscription of each, he made a new contract out of the plain terms of the written one and distinctly different for the interpretation placed upon it by both parties, and if this construction of the contract made it appear to the court below, that the Circuit court had not jurisdiction of the subject-matter of this action, the plaintiffs in error contend that it was such error as should cause a reversal of the judgment of the court below.

The entire record, therefore, when considered in its component parts, of pleadings, contract and evidence, or in its entirety, furnishing no ground upon which the Circuit court could justly found its judgment, that it did not have jurisdiction of the subject-matter of the action before it, the plaintiffs in error, therefore, pray that the judgment of the United States Circuit court for the District of Kansas, in this cause, be reversed.

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THE LAW ASSOCIATION
OF
PHILADELPHIA.

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(15,203.)

IN THE

Supreme Court of the United States.

October Term, 1895.

No. 185.

DANIEL J. DAVIS AND THOMAS RANKIN,
Partners, doing business as
Davis & Rankin,
Plaintiffs in Error,

vs.

H. F. GEISSLER, JOHN P. SMITH,
WILLIAM HUFFMAN, et al.,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF KANSAS.

BRIEF FOR DEFENDANTS IN ERROR.

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BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

In addition to the statement of the case made in the brief of counsel for plaintiffs in error, we desire to call the attention of this court to some other facts principally bearing on the question of jurisdiction.

This was an action in assumpsit brought by plantiffs in error in the United States Circuit Court for the District of Kansas against the defendants, thirty-six in number, charging them

jointly upon a contract, a copy of which is set forth in the record. (Tr., pp. 5-7.)

The answer raises, among other issues, that of fraud in the obtaining of the contract; and of the non-performance of contract by the plaintiffs. The question of jurisdiction is raised; first, by alleging that B. Mahanna, named as one of the defendants, and who was a subscriber to the amount of $850.00, was a co-citizen with plaintiffs of the State of Illinois, and, therefore, that the court did not have proper jurisdiction of the parties; and, second, by alleging fully the facts showing that the contract sued upon was not a joint contract, by which the subscribers became jointly liable for the full amount of $5,000.00, as alleged, but a several contract upon which the liability of each defendant was limited to the amount of his subscription, which amount was in no case over $850.00; and, therefore, that no one of the defendants was liable for a sufficient amount to give the court jurisdiction.

It appeared by the evidence that plaintiffs were doing business in the City of Chicago; that B. Mahanna was their duly authorized agent to organize creamery companies in different parts of the country, making contracts for the erection of buildings for such purpose, and that during the fall of 1887 he came to Oakley, Kansas, for such purpose, and while there, with the assistance of one Doering, induced the defendants, some thirty-six in number, to make their subscriptions to the captital stock of the proposed creamery company. The printed contract set forth in the record was taken by said Mahanna, accompanied by said Doering, and presented to the people in that vicinity, most of them living near Oakley, and the subscriptions of thirty-six different persons were obtained, the subscription in each case showing the number of shares of stock of the par value of $100.00 each, and the amount of stock, taken by each sub-

scriber. The subscriptions ranged in amount from $400.00 down to $50.00, in some cases two men uniting to take jointly one share of stock. After Mahanna had secured subscriptions to the amount of $3950.00, and in order to make up the necessary amount of $5,000.00, he subscribed for one share of stock jointly with one Colvin, and for eight shares purporting to be on his individual account, thus attempting to make up the full $5,000.00; by mistake in the calculation, however, according to the record, it seems that the actual amount of subscriptions would, with Mahanna's, only be $4,800.00. The contract was executed on behalf of plaintiffs by Mahanna.

The evidence further shows that Mahanna represented to nearly all of the subscribers at the time he got their subscriptions, that they would each be only holden for the amount by them severally subscribed, and further promised that before the delivery of the contract to Davis & Rankin, a meeting of the subscribers would be called and a clause inserted in the contract to the effect that each subscriber would be held for no more than the amount of his own subscription.

The deposition of B. Mahanna was taken, in which he, among other things, admits and avers his liability to the plaintiffs for the $850.00 worth of stock subscribed by him, and in case of the default by other stockholders for double the amount of his stock (Tr., p. 39), thus showing that Mahanna, himself, regarded the liability of each subscriber limited or determined by the amount of his subscription, and the contract to be several and not joint. But after this deposition was taken, it appeared on the trial that B. Mahanna was a citizen and resident of Illinois, the same State with the plaintiffs; and after this fact was brought out by the evidence, and in order to save, if possible, the jurisdiction of the court, the secretary of the Davis & Rankin Manufacturing company swears in rebuttal that the

subscriptions of Mahanna had been paid, so that he owed plaintiffs nothing on that score. (Tr., p. 94.)

Other evidence was heard bearing on the question of the construction of the contract and of the jurisdiction of the court, to which we shall call attention in our argument. The court, after hearing the evidence, decided that it had no jurisdiction and dismissed the case; judgment was entered accordingly November 28, 1891. No bill of exceptions was presented to or signed by the trial judge until September 26, 1892, after at least two terms of court had intervened.

No certificate was made by the court below certifying to this court the question of its jurisdiction.

The defendants in error have recently filed in this court a motion to dismiss this case, said motion being set for March 30, 1896, which motion we respectfully ask to have considered by the court in connection with the hearing of the case upon the merits. Said motion is as follows, omitting caption:

"And now come said defendants in error and move this" "court to dismiss this case and the writ of error heretofore" "issued herein upon the following grounds, to-wit:"

"1. This court has no jurisdiction in this case."

"2. This case is brought to this court directly from the" "Circuit Court of the United States for the District of Kan-" "sas, and can be heard solely upon the question of the juris-" "diction of said Circuit Court; but the plaintiffs in error have" "failed to obtain from said Circuit Court any certificate pre-" "senting the question of its jurisdiction to this court for de-" "termination, as required by the statute and by the rules of" "this court in such case made and provided, and this court" "cannot review this case upon that question."

ARGUMENT.

I.

We respectfully ask the first attention of this court to the question of its own jurisdiction in this case, and to the consideration of the motion filed by the plaintiffs in error to dismiss for want of such jurisdiction.

This case is within Section 5 of the Judiciary Act of March 3, 1891, and could be brought to this court directly from the Circuit Court only upon the question of the jurisdiction of that court.

But this section provides that "in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." There is in this case no such certificate from the court below.

Accordingly, no course is left open to this court but to dismiss the writ of error for want of jurisdiction. Any discussion of the question is rendered unnecessary by the recent decisions of this court, wherein it was held that in such cases a certificate by the Circuit Court presenting the question of the jurisdiction of the court below for the determination of this court is explicitly and in terms required in order to invoke the exercise by this court of its appellate jurisdiction, and that the absence of such certificate is fatal to the maintenance of an appeal or a writ of error in this court.

Maynard vs. Fecht, 151 U. S., 324.

Colvin vs. City of Jacksonville, 157 U. S., 368.

Davis & Rankin Building and Manufacturing company vs. Barber, 157 U. S., 673.

Van Wagenen vs. Sewal (January 6, 1896, advance sheets, p. 368.)

II.

There is no bill of exceptions in this case properly before this court. The judgment of the court below was rendered and entered November 25, 1891, at the November term of the Circuit Court, that term ended in December, 1891. The bill of exceptions was filed September 26, 1892, with the endorsement of the trial judge as follows: "This 26th day of September, A. D. 1892, John A. Riner, Judge." (Record, p. 93.) Two terms of the Circuit Court had intervened between the date of the judgment and the date of the signing and filing of the bill of exceptions. There is nothing whatever in the record to show any reason why the bill of exceptions was not filed at the same term, as required by the rule in such cases.

U. S. vs. Johnson, 149 U. S., 260.

Mich. Ins. Co. vs. Eldred, 143 U. S., 293.

Counsel for plaintiffs in error call attention in their brief to the memorandum endorsed on the bill of exceptions, as follows: "Corrections made and now O. K., the judge can allow and sign the foregoing, June 6, 1892; Wilcockson & Waters, attorneys for defendants." But this memorandum was not signed until long after the November term had expired. We understand that in order to have a stipulation by attorneys in such cases effective as a waiver of the rule, such stipulation must have been made during the same term, or at least before the right to an allowance of the bill had already expired.

But even if this stipulation could have been effective at that date to have restored a right already lost, it could hardly be construed as extending indefinitely the time within which the bill of exceptions could be allowed, or to permit the allowance and filing nearly four months after the date of such stipulation.

Counsel in their brief (p.4) suggest that the bill of exceptions had been prepared in due time and served on attorneys for the defendants below for their approval, and that they retained and withheld it until June 6, 1892. Counsel give no date of such alleged service in their brief. As we understand the facts, the proposed bill of exceptions was not handed to attorneys for defendants until long after the expiration of the November term, and only a few days prior to June 6, 1892, when the same was returned. However this may be, the record itself fails to show any facts justifying the allowance or filing of the bill of exceptions at the time it was apparently signed and filed. We understand that such facts must appear affirmatively in the record itself.

III.

The Circuit Court had no jurisdiction of the parties. It is admitted that one of the defendants, B. Mahanna, the largest subscriber to the stock, was a citizen and resident of Illinois, of which State the plaintiffs were also citizens and residents. Counsel , however, say that Mahanna had compromised the claim of plaintiffs below against him, or paid his subscription, and therefore he was not a necessary party. An examination of the record shows that in their petition the plaintiffs claimed the amount of $4,900, being the full amount of $5,000, less the $100.00 (which appeared in the evidence to have been paid by one Teft, another subscriber), and it appears that when action was commenced, if plaintiffs' view of the contract was correct, Mahanna was a proper party. Mahanna's own evidence, taken by deposition, shows that he still owed the amount of his subscription. (Tr., p. 39.) Plaintiffs' other evidence showed no payment except the $100.00 paid by Willard Teft. (Tr., pp.

42-43-44.) Upon the trial, however, and after the facts relative to the residence and citizenship of Mahanna had been developed by the evidence, and apparently in order to avoid the necessary result of proving the want of jurisdiction of the parties by the Circuit Court, Mr. Woodbury, the secretary and treasurer of the Davis & Rankin Building and Manufacturing company, and one of the attorneys for the plaintiff upon the trial, testified in rebuttal that Mahanna's subscription to the creamery had been paid and that he owed plaintiffs nothing. (Tr., p. 91.) He does not give the date of such payment, but it appears that if any settlement at all was made by plaintiffs with Mr. Mahanna, their own agent, on his subscription, it was after the action was commenced, and apparently on the trial, and for the express purpose of giving the court jurisdiction over the other parties.

The question of the jurisdiction of the Circuit Court over the parties depends on the facts which exist at the date of the commencement of the action, and the plaintiffs cannot make a settlement subsequently or upon the trial with one of several defendants, for the express purpose, as was manifestly done in this case, of giving the court jurisdiction over the other parties.

IV.

The Circuit Court had no jurisdiction of the subject matter of the action, as was properly decided by that court.

The principal question arising in this connection was as to whether the obligation of the defendants was joint or several in its character. If several, then, as the amount of none of the several subscriptions was greater than $850.00, the amount involved in the action was insufficient to give that court jurisdiction.

It is well settled that plaintiffs cannot join in a single suit two or more defendants, and obtain jurisdiction by reason of the fact that the total amount exceeds the sum necessary to give the court jurisdiction, the test of jurisdiction in such case being the joint or several character of the liability.

Walter vs. N. E. R'y Co., 147 U. S., 370.

Gibson vs. Shufeldt, 122 U. S., 27.

It is also well settled that whatever may be the amount claimed in the petition, whenever it appears to the trial court as a matter of law, from the nature of the case as stated in the pleadings, or as the facts appear on the trial, that there could not legally be a judgment recovered for the amount necessary to the jurisdiction, the case may properly be dismissed.

Barry vs. Edmunds, 116 U. S., 550.

Hilton vs. Dickinson, 108 U. S., 165.

The question of jurisdiction could be properly determined only by the court. So far as it depended on questions of fact, the court must also determine such facts. In this case the question depended principally on the construction of the contract, which was a question exclusively for the determination of the court, and the court having properly construed the contract as creating only a several liability, it therefore properly held that the court had no jurisdiction of the subject matter.

Counsel for plaintiffs in error insist that the contract should have been construed as creating a joint liability of each subscriber for the full amount. It may be admitted that there is language in the contract which, taken by itself, would seem to justify this claim. But in construing a contract all of its parts should be considered, and the point to be ascertained is the meaning and understanding of the parties, as shown by the

language used, the nature of the transaction, and the surrounding circumstances; one part of the agreement may be used to explain the meaning of the language and expression of the other parts.

Pensacola Gas Co. vs. Lotzes, 2 So. Rep. (Fla.), 690.

Kyle vs. Bellenger, 79 Ala., 516.

Where the language of the written contract is ambiguous, the practical interpretation of it by the parties is entitled to great, if not controlling, influence.

Topliff vs. Topliff, 122 U. S., 121.

An examination of the printed contract, taken in connection with plaintiff's mode of operation, discloses upon its face an attempt to devise a contract with which to deceive and defraud the unwary, and which, while appearing to the subscribers, to only hold each for the amount of his subscription, might in fact hold each for the full amount of all the subscriptions; but if an examination of the contract is made in all its parts, and in the light of the principles governing the construction of contracts, and in view of all the surrounding circumstances, and plaintiff's mode of operation, we believe this court will say that plaintiffs have not succeeded in their transparent and unholy purpose.

The Supreme Court of Michigan decided this precise question in the case of Davis vs. Belford, 37 N. W. Rep., 919. The plaintiffs in error in this case were also plaintiffs in that case; defendants in that case, some forty-two in number, had subscribed in various amounts to a printed contract identical in form with that signed in this case. The plaintiffs' mode of operation in getting these subscribers was nearly similar to that pursued in this case. The court below had construed the

contract as a several contract, and held that the liability of each subscriber was limited to the amount subscribed by him, and directed a verdict for the defendants. The Supreme Court affirmed this judgment, and said:

"We think the court below was correct in its construction" "of the contract, and properly directed the verdict. The law" "for the construction of contracts is well settled in Dwelley" "vs. Dwelley, 10 N. E. Rep., 468. In the construction of con-" "tracts the court will look at all the circumstances of the case," "the nature of the property, the occupation and relation of" "the parties, the usages of the place and of the business to" "which the contract relates, and ascertain by reasonable in-" "ference what the parties must have understood and mutually" "expected at the time of making the contract, and then adopt" "that construction that will best and most correctly carry the" "contract into effect as they intended and understood it. Ap-" "plying this rule to this contract, there is no difficulty in reach-" "ing the conclusion arrived at by the learned judge who heard" "the case. The defendants were forty-two in number, pre-" "sumably following different occupations, trades and busi-" "nesses, scattered over a considerable territory at and near" "Holley, in Oakland county. Plaintiffs' agent having in" "charge the printed form of the contract, obtained the sig-" "natures of the defendants, some of them subscribing $25.00," "and others in amounts of $50.00, $100.00, $200.00, and one" "the sum of $500.00. The amount to be raised was $4,500.00." "Is it to be presumed from the reading of the contract that" "when one placed his name there for $25.00 he at once became" "liable to plaintiffs for the whole $4,500.00, the balance of" "which had not yet been subscribed, and the persons who" "were to make up the balance wholly unknown to the first" "subscriber? Or, is it to be presumed from the reading of" "the contract that the first subscriber became liable for the" "amount subscribed by each additional one, whoever that sub-" "scriber might be and for whatever amount he might sub-"

"scribe, the first subscriber having no knowledge or informa-"
"tion of the standing or responsibility of those subscribing"
"after him? We cannot believe that the defendants could"
"have so understood the language employed in the contract,"
"and from the circumstances surrounding the case, and the"
"conduct of the plaintiffs and their agents both before and"
"after its execution, it would seem that they did not so con-"
"strue it, but on the contrary acted upon the theory that each"
"subscriber was only liable for his individual subscription."
"and this is the construction we must give it."

The circumstances in this case are much stronger in support of our contention than in the Michigan case. In this case the agent, Mahanna, assured nearly all of the subscribers at the time of getting their subscriptions, that the liability of each was limited to the amount of his subscription, and it was further agreed by him that a clause to that effect should be inserted in the contract before its delivery to the plaintiffs at a meeting of the subscribers to be duly called. (See Record, pp. 52, 57, 59, 61, 63, 66, 69, 71.) If the contract was intended to be understood by the subscribers to be joint, why did plaintiffs prepare for their signature a printed form of subscription, which, on its face, is a mere subscription for a certain number of shares of stock, and stating definitely the amount of each subscription? Why should they solicit two parties to jointly subscribe for one share, as was done in four cases? Counsel say in their brief that the contract provided that the subscribers *may* incorporate, not *must* or *shall* incorporate; but why should plaintiffs be called on to give permission to incorporate? Was this necessary? The contract, taken as a whole, without the aid of any intrinsic evidence, clearly shows the intention on the part of the subscribers to be to merely become subscribers for stock in a proposed incorporation, and that the liability of each should be limited by the amount of his subscription.

The evidence further shows that both parties treated this as a several contract, and not joint. Counsel for plaintiffs in error say in their brief, that the defendants themselves treated it as a joint contract, but the only thing upon which this statement is based, was the fact that they joined in their answer and defense in this case. It does appear, however, that the plaintiffs themselves treated the contract as several, by negotiating severally with different ones of the subscribers, and collecting, or endeavoring to collect, from each the amount of his own subscription. (Tr., pp. 42-91.)

Inasmuch as this court has no jurisdiction, according to our view of the case, we do not deem further discussion of the proper construction of the contract necessary or profitable in this case. Davis v Rankin vs Barber, 51 Fed. R. 14
" " " Jones 66 " " 12

In conclusion, we respectfully submit that this case should be dismissed for the want of jurisdiction in this court. If this court concludes that it has jurisdiction, then we submit that the judgment should be affirmed.

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